IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-38

MIKE BRUCE, ET AL., *Appellants*,

v.

WICHITA STATE UNIVERSITY, *Appellees*.

**On Appeal from the Supreme Court of the State of Kansas**

## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

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This is an appeal from the final judgment of the Supreme Court of the State of Kansas, entered on April 15, 1976, in a civil tort action brought by the appellants against Wichita State University based upon alleged negligence of the University which resulted in the plane crash of October 2, 1970, near Silver Plume, Colorado. Appellants are survivors and representatives of persons on board said flight. At issue are certain statutes of the State of Kansas, relating to governmental immunity, which have been held by the courts below to comport with the Constitution of the United States and bar appellants' claims

(though the Kansas Supreme Court at one time held the statutes violative of the United States Constitution). Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions requiring plenary consideration are presented.

## OPINIONS BELOW

The District Court of Sedgwick County, Kansas, ruled, on January 11, 1973, that appellants' actions were barred by the Kansas immunity statutes, K.S.A. 46-901, 902 (Volume 3A, Page 614). No opinion was delivered by the trial judge. An appeal of the trial court decision was taken before the Supreme Court of Kansas, the court of last resort of the State of Kansas. The first opinion of the Supreme Court of the State of Kansas, filed June 9, 1975, *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P.2d 66, is submitted herewith as Appendix "A". It holds the statutes unconstitutional. The second opinion of the Supreme Court of the State of Kansas, on rehearing, was filed March 6, 1976. The second opinion has not yet appeared in the official reporter and appears at 547 P.2d 1015. The second opinion is submitted herewith as Appendix "B". It holds the statutes constitutional in a four-to-three decision.

## JURISDICTION

This suit was originally brought in the District Court of Sedgwick County, Kansas, based upon common law negligence, strict liability, and breach of contract. The trial court, relying on the Kansas immunity statutes, K.S.A. 46-901, 902, entered judgment on behalf of Wichita State University and against



appellants. A copy of the Journal Entry of Judgment is submitted herewith as Appendix "C". Appeal from that ruling was perfected and on June 9 1975, the Supreme Court of the State of Kansas reversed the trial court, finding K.S.A. 46-901, *et seq.,* repugnant to the Fourteenth Amendment of the United States Constitution. Thereafter, Wichita State University, sought a modification of the Court's opinion. The Court treated the request as a Motion for Rehearing and entered two orders, one directing a rehearing and another setting forth issues to be briefed on rehearing. Both orders are submitted herewith as Appendix "D". Following rehearing, the Supreme Court of the State of Kansas, on March 6, 1976, reversed its previous position and in a four-to-three decision found the statutes not violative of the Fourteenth Amendment to the United States Constitution. Following the second opinion of the Kansas Supreme Court, appellants sought a rehearing but their request was denied on April 15, 1976. Notice of Appeal to the Supreme Court of the United States was filed June 30, 1976, in the Supreme Court of the State of Kansas. The order denying rehearing and the Notice of Appeal are submitted herewith as Appendix "E".

The Supreme Court has exclusive jurisdiction to review this decision under 28 USC § 1257(2) because the validity of state statutes has been drawn into question on the ground that they are repugnant to the United States Constitution, and the highest court of the State of Kansas has delivered its final decision in favor of the statutes' validity. The statutes in issue are set forth verbatim and submitted herewith as Appendix "F".

## QUESTIONS PRESENTED

1. Whether the Kansas immunity statutes, K.S.A. 46-901, *et seq.*, are unconstitutional and void as (a) denying equal protection of the law, and (b) violating the guarantee of due process of law both as provided by the Fourteenth Amendment to the United States Constitution.

2. Whether the Supreme Court of the State of Kansas erred in holding that the doctrine of governmental immunity, as codified in K.S.A. 46-901, *et seq.*, is constitutionally valid even though said statutes protect all acts of the State of Kansas, including proprietary and nondiscretionary functions.

3. Whether the Kansas immunity statutes, K.S.A. 46-901, *et seq.*, are overly broad and violative of the United States Constitution in that they create invidious discrimination in areas of activity where the State of Kansas has no valid interest in creating discriminatory immunity.

## STATEMENT OF THE CASE

Appellants jointly brought their actions in the District Court of Sedgwick County, Kansas, against Wichita State University and Wichita State University Physical Education Corporation for damages resulting from injuries caused by the crash on October 2, 1970, of a chartered aircraft carrying members of the 1970 Wichita State University football team, members of the faculty, and University supporters. The appellants are either surviving passengers or the personal representatives of those killed in the crash.

Prior to the flight of October 2, 1970, an Aviation Service Agreement was entered into between Wichita



State University and Golden Eagle Aviation, Inc., an Oklahoma corporation, for purposes of transporting the University football team to its away games during the 1970 football season. That agreement (which appears as Appendix "A" in the initial opinion by the Kansas Supreme Court, 217 Kan. 279, 308) was attested by Floyd W. Farmer, secretary of Wichita State University Physical Education Corporation, Inc.

On the day of the accident, members of the Wichita State football party departed Wichita, Kansas, in two Martin 404 aircraft for Logan, Utah, for a football game with Utah State University scheduled for Saturday, October 3, 1970. The aircraft in which appellants or their decedents were riding, Martin 404, No. 464M, crashed into a mountainside near Silver Plume, sixteen miles west of Georgetown, Colorado.

Appellants brought their actions alleging: (1) that Wichita State University Physical Education Corporation (hereinafter referred to as PEC) was the agent of Wichita State University (hereinafter referred to as WSU); (2) that WSU, through its agent, had been negligent in its selection of Golden Eagle Aviation, Inc. (Golden Eagle) to provide transportation for its football team and had been negligent in its operation of the flights; and (3) that appellants were third party beneficiaries to the contract between WSU and Golden Eagle whereby WSU was to provide liability insurance in conformance with the applicable federal regulations for said flight. WSU did not purchase the insurance as required by the terms of the contract.

A Motion for Summary Judgment was filed by WSU, contending that appellants' negligence actions

were barred by the Kansas immunity statutes, K.S.A. 46-901, 902, and that appellants' contract claims were invalid for the reason that WSU was not bound by the contract entered into between it and Golden Eagle because certain statutory procedures had not been followed. Appellants responded to WSU's motion with a responsive brief arguing that the immunity statutes were repugnant to both the Kansas and United States Constitutions. (In the same brief, appellants also responded to the issues relating to their claims as third party beneficiaries.)

The trial court summarily rejected appellants' contentions, specifically finding K.S.A. 46-901, *et seq.*, constitutional.

Thereafter, the PEC filed a Motion for Summary Judgment which was likewise sustained.

The issue before this Court relates to the tort actions brought by appellants. On appeal to the Kansas Supreme Court, appellants contended that K.S.A. 46-901, *et seq.*, was violative of Sections 1 and 2 of the Kansas Bill of Rights and of the Fourteenth Amendment to the United States Constitution for the reason that said statutes denied appellants due process and equal protection of the law.

In its initial decision, the Supreme Court of Kansas agreed with appellants' position and said:

> "The doctrine of governmental immunity is an historical anachronism which manifests an inefficient public policy and works injustice upon everyone concerned." 217 Kan. 279, 297.

After reviewing the provisions of K.S.A. 46-901, *et seq.*, the Court held:



> "The doctrine of governmental immunity as declared in K.S.A. 46-901, 902 is unconstitutional and void as (*a*) denying equal protection of the law, (*b*) violating the guarantee of due process of law, both as provided by the Fourteenth Amendment to the Constitution of the United States and Sections 1 and 2 of the Kansas Bill of Rights . . ." 217 Kan. 279, 281 (20th syllabus)

The Court further held that intercollegiate football is an proprietary function and that the transporting of players and others to a scheduled away intercollegiate football game is likewise a proprietary function. The Court then reversed the decision of the trial court and remanded appellants' actions for further proceedings.

Thereafter, WSU filed a Motion for Modification of Decision in which it asked the Court to clarify whether it was abrogating governmental immunity as to all acts of the government or only as to proprietary functions. The Court chose to treat the motion as a Motion for Rehearing and on September 12, 1975, entered its order granting a rehearing. On October 2, 1975, the Court entered a subsequent order in which it asked the parties to brief four specific questions relating to governmental immunity.

On March 6, 1976, the Court announced its opinion on rehearing. In a four-to-three decision, the Court reversed its previous position and held:

> "The doctrine of governmental immunity as declared in K.S.A. 46-901, *et seq.*, does not offend constitutional guarantees in Sections 1, 2 and 18 of the Kansas Bill of Rights, the Fourteenth Amendment to the Constitution of the United States or any other constitutional provision; . . ." —— Kan. ——, 547 P.2d 1015, 1018 (8th syllabus)

On April 14, 1976, the Kansas Supreme Court denied appellants' Petition for Rehearing and mandate was issued on April 15, 1976.

The issue of the subject statutes' validity in light of the due process and equal protection guarantees of the Fourteenth Amendment of the United States Constitution was drawn in question at every level of appellants' actions in the courts below. When the Motion for Summary Judgment was filed by WSU, appellants argued to the trial court that the statutes violated not only the Kansas Constituion but the Fourteenth Amendment of the United States Constitution. The trial court rejected this argument.

Likewise, on appeal to the Supreme Court of the State of Kansas, appellants' only contention with regard to K.S.A. 46-901, *et seq.,* was that they violated the Constitution of the State of Kansas and the Fourteenth Amendment of the United States Constitution. The Kansas Supreme Court initially agreed and invalidated the statutes.

On rehearing, the issue before the Court again was specifically the statutes' validity in light of the Kansas Bill of Rights and the Fourteenth Amendment of the United States Constitution. In its opinion on rehearing, the Kansas Supreme Court specifically finds the statutes are not repugnant to the Fourteenth Amendment.

**SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED**

The holding in each of the two opinions issued by the Kansas Supreme Court with respect to governmental immunity specifically resolves appellant's



claims on the basis of the constitutionality of the Kansas immunity statutes.

In the initial opinion, *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P.2d 66, the Court carefully reviewed the history of governmental immunity in the United States and in the State of Kansas and found that neither the United States Constitution nor the Kansas Constitution confer immunity upon the State of Kansas. The Court then reviewed the legislatively imposed immunity as codified in K.S.A. 46-901, *et seq.,* in light of the provisions of the Kansas and United States Constitutions and found the statutes violative of those documents' guarantees of due process and equal protection of the law. After noting that the subject statutes provided immunity for the state and certain named state agencies, but not for other arms of state government, such as counties and municipalities, the Kansas Court commented:

> "Under present Kansas law, no regard is given to the injury or the facts and circumstances surrounding the events which caused the injury—it is the type of governmental agency and the activity in which it is engaged that determines whether the aggrieved party will find the doors of the court open or closed. Such a classification is forced and unreal, and greater burdens are imposed on some than others of the same desert. We find the classifications contained in K.S.A. 46-901, 902 are not only 'baffling,' but arbitrary, discriminatory and unreasonable." 217 Kan. 279, 297.

The Court rejected arguments that the discrimination created by the Kansas immunity statutes was not invidious. In particular, the Court reviewed WSU's contentions that the state has a valid interest

in creating such classifications in order to relieve the state of the threat of multiple lawsuits, provide convenience in the operation of government, and protect the state treasury. These considerations were found by the Court to be unreal and lac' ing in merit when weighed against the individual rights of those aggrieved by the statutes.

In the opinion on rehearing, the Court again considered the validity of the statutes in light of the Fourteenth Amendment of the United States Constitution and the majority determined that even though the classifications might be imperfect, they were constitutionally permissible and the statutes therefore valid. The majority noted *Ferguson* v. *Skrupa,* 372 U.S. 726, 10 L. Ed. 2d 93, 83 S.Ct. 1028, 95 A.L.R.2d 1347, in which the Supreme Court of the United States said that statutes may create classifications which do not deny equal protection and that it is only "invidious discrimination" which offends the Constitution. The majority then determined (erroneously, appellants contend) that the state had three valid interests which supported the legislative classifications: (1) the necessity to protect the state treasury; (2) the need to allow the state to function unhampered by the threat of time and energy consuming legal actions; and (3) the need to protect the state in high risk activities. The majority found these interests sufficient to outweigh the individual interests of those denied legal redress by the immunity statutes and determined that a violation of the Fourteenth Amendment guarantees of due process and equal protection of the laws was not present.

The minority vigorously rebuked all three of the cited interests and found that they failed as a rea-



sonable justification for making a distinction between the classes created by the statutes.

With regard to the majority's claim that the statutes are necessary to protect the state treasury, the minority noted that "experience does not bear out these fears." *Brown* v. *Wichita State University,* —— Kan. ——, 547 P.2d 1015, 1037. The dissent pointed out that the federal government, a number of states, many foreign countries, and cities in most states have adopted comprehensive rules of government responsibility in tort without suffering the feared financial consequences. *Id.* at 1037. With the availability of liability insurance and other techniques of absorbing the burden and spreading the cost, the necessity of protecting the state treasury fails as a rational classification.

As for the second interest relied upon by the majority, Chief Justice Fatzer commented:

> "To say that the treat of legal actions will intolerably hamper government activities is to say that government alone, among all our institutions, cannot properly function if it shoulders responsibility for its actions." —— Kan. ——, 547 P.2d 1015, 1038.

The Chief Justice further noted that immunity fosters neglect and breeds irresponsibility. *Id.* at 1039. Thus, the removal of immunity is more apt to reduce neglect and irresponsibility in government, rather than hamper its administration.

Finally, the dissent cogently observes that the subject statutes paint with an "overly broad brush" when they attempt to protect the state in high-risk activities which it necessarily performs, in that they not only

protect such high-risk activities, but they completely immunize *all* state activities. *Id.* at 1039. Thus, the majority, in an effort to protect the state in activities which may warrant immunity, has chosen to uphold the validity of the Kansas immunity statutes in activities which clearly do not warrant immunity. There is no rational justification.

As the dissent points out, K.S.A. 46-901, *et seq.*, creates two classes of governmental entities: (1) the state, and (2) all others. Further the statutes create two classes of persons: (1) victims of tortious conduct of the state, and (2) victims of tortious conduct of all other governmental entities. The only equal treatment afforded by the statutes is to deny redress to all members of the class of victims of tortious conduct of the state; similar persons, similarly situated, but in different classes, do *not* receive similar treatment. —— Kan. ——, 547 P.2d 1015, 1036. Where, as here, there is no rational basis for the failure to treat equally, invidious discrimination exists and must perish when exposed to the light of the Fourteenth Amendment.

In lamenting the majority's opinion on rehearing, Chief Justice Fatzer comments:

> "Governmental immunity as applied by K.S.A. 46-901 and 902 is completely contradictory to the principles on which our government is based—that government exists for the benefit of the people and must be held responsible to them. In 1976, insulating state government at the expense of the personal well-being of the people shocks the conscience. To maintain a system of laws whereby we are individually liable but collectively immune is more than irrational, it is immoral." —— Kan. ——, 547 P.2d 1015, 1043.



The minority further noted that the statutes protected the state's activities in all areas, including proprietary and nondiscretionary functions in which the state had *no* valid interests to weigh against the individual's rights under the constitution.

Both the majority and dissenting opinions discussed several decisions of the United States Supreme Court. In particular, the majority relied upon three cases, *Beers* v. *State of Arkansas,* 61 U.S. 527, 15 L.Ed 991; *Palmer* v. *Ohio,* 248 U.S. 32, 63 L.Ed. 108, 39 S.Ct. 16; and *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 12 L. Ed 2d 233, 84 S.Ct. 1207, *reh. denied,* 377 U.S. 1010, 12 L. Ed. 2d 1057, 84 S.Ct. 1903, which, the majority contended, hold sovereign immunity to be constitutional. However, the cases do not reflect such holdings and in fact do not consider, in light of the Fourteenth Amendment, governmental immunity or statutes such as are presented here.

The first case cited by the Court, *Beers, supra,* was decided prior to the adoption of the Fourteenth Amendment and can hardly be considered of any persuasive value in the present case.

In *Palmer, supra,* the plaintiffs were attempting to argue that the state had consented to be sued under a section of the Ohio Constitution. The plaintiffs were not attacking an immunity statute under the Fourteenth Amendment, but were attacking the application of a specific state constitutional provision. The U.S. Supreme Court found no federal question and dismissed the appeal. The *Palmer* decision was handed down in 1918 and even if it had considered the issue presently before this Court, it would be of limited value.

Finally, in *Parden, supra,* the question before the Court was whether a state that owns and operates a railroad in interstate commerce can successfully plead sovereign immunity in a Federal suit brought against the railroad under the Federal Employers' Liability Act. The Court found that by engaging in interstate commerce, the state was subject to the provisions of the F.E.L.A. and had consented to waive its immunity. A direct attack upon the immunity statute, based upon equal protection, was *not* made. Thus, none of the cited United States Supreme Court cases lend credence to the majority position since none talk about "class" discrimination, the issue now before this Court. Moreover, none of these cases approach supporting the majority's position that the three "interests" cited by it render the subject statutes constitutionally valid.

Citing *Rinaldi* v. *Yeager,* 384 U.S. 305, 308-09, 16 L. Ed. 2d 577, 580, 86 S.Ct. 1497; *James* v. *Strange,* 407 U.S. 128, 32 L. Ed. 2d 600, 92 S.Ct. 2027; *Reed* v. *Reed,* 404 U.S. 71, 30 L. Ed. 2d 225, 92 S.Ct. 251; and *Ferguson* v. *Skrupa, supra,* Chief Justice Fatzer attempted to measure the "interests" cited by the majority against constitutional guarantees of due process and equal protection of the law and found the interests to be no more than "apologetics" which cannot withstand careful analysis. —— Kan. ——, 547 P.2d 1015, 1037.

The issue, then, before the courts below was the validity of these statutes in light of the Fourteenth Amendment of the United States Constitution. The questions presented by this appeal are, therefore, federal questions. The only remaining issue is whether these federal questions are substantial.



Rule 15(1)(e), Rules of the Supreme Court of the United States (effective July 1, 1970), provides that where an appeal is taken from a state court, there must be a showing that the questions involved are substantial. Within the rule is cited *Zucht* v. *King,* 260 U.S. 174, 176, 177, in which the court found no substantial federal question. There the issues sought to be reviewed had been decided by the Court on at least three previous occasions. In the present appeal, however, appellants find no decisions of the United States Supreme Court in which the issue of governmental immunity has been considered in light of the Fourteenth Amendment of the United States Constitution. The issues presented herein having never been resolved by this Court, the federal questions thus become substantial.

The issues present in the case at bar come within the definition of "substantial federal questions" as set forth in *Louisville N. & R. Co.* v. *Melton,* 218 U.S. 36, 30 S.Ct. 676, in which the Court denied a Motion to Dismiss even though there had been prior decisions of the Court which were decisive of the issue presented therein. In so ruling, the Court said:

> "We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; (b) because the division in the opin-

ion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as to not afford ground for jurisdiction to review the action of the court below; and (c) because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject." 218 U.S. 36, 49, 50.

In the *Louisville* case, the Kentucky Court of Appeals denied a rehearing of the appeal, but two members of the court dissented in the denial, contending the state statute in issue therein was repugnant to the Federal Constitution.

The present appeal not only presents an issue which has not been explicitly foreclosed (or even explicitly considered) by the Supreme Court, but also involves a marked division in opinion of the lower court as to whether the statute was repugnant to the Fourteenth Amendment. Indeed, the lower court has announced two opinions, one holding the statute invalid by a four-to-three margin, and the other holding the statute valid by a four-to-three margin. One justice changed his mind.



Finally, the present appeal concerns an overly broad statute. Thus, the present appeal bears striking similarity to that presented in *Louisville, supra,* and is, under the tests set out therein, properly a subject for plenary review by this Court. See also *Milheim* v. *Moffat Tunnel Improvement Dist.,* 262 U.S. 710, 43 S.Ct. 694, 67 L. Ed. 2d 1194.

In *Cohen* v. *California,* 403 U.S. 15, 29 L. Ed. 2d 284, 91 S.Ct. 1780, the Court said:

> "The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 USC § 1257(2); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 US 282, 66 L Ed 239, 42 S Ct 106 (1921)." 403 U.S. 15, 17, 18.

Appellants herein have at all times in the subject litigation asserted that the Kansas immunity statutes are repugnant to the Fourteenth Amendment of the Federal Constitution and, under *Cohen,* have thereby properly invoked the jurisdiction of the Supreme Court of the United States.

The issue to be determined in this appeal is not imagined or frivolous. It involves the important guarantees of due process and equal protection of the laws as set forth in the Fourteenth Amendment and whether those guarantees have been denied by the enactment of the subject statutes. The Court has not issued prior

opinions which would decide the issues involved herein and the two directly conflicting opinions announced by a sharply divided Kansas Supreme Court manifest the substantial nature of the issues raised and the need for this Court to grant plenary review.

Appellants are *not* asking this Court to review the constitutionality of governmental immunity in the several states. Appellants *are* asking this Court to review the invidious discrimination of certain Kansas statutes which the Kansas Supreme Court at one time held repugnant to the Fourteenth Amendment of the United States Constitution. But for one Justice below changing his mind, appellants would not be before this Court today.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

No. 47,363

MARVIN G. BROWN, SR., et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*. MIKE BRUCE, et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*. HALLIE EUGENIA ROBINSON, Individually and as the Administratrix of the Estate of Eugene Robinson, et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*.

• • • • • • • • • •

The opinion of the court was delivered by

FATZER, C. J.: This is an appeal from an order of the district court sustaining the defendant-appellee Wichita State University's motion for summary judgment.

The appeal arises out of the crash of a chartered aircraft carrying members of the 1970 Wichita State University football team, members of the faculty and university supporters. The plaintiffs—the appellants—are either surviving passengers or the personal representatives of those killed in the crash. The chronology of events giving rise to this action follows:

On July 21, 1970, an Aviation Services Agreement was executed by Golden Eagle Aviation, Inc., and Wichita State University for the period commencing September 11, 1970, and ending November 14, 1970—the scheduled 1970 football season. That agreement, attached as Appendix A to this opinion, was executed by Bruce J. Danielson on behalf of Golden Eagle, and by Bert Katzenmeyer, Athletic Director of Wichita State University on behalf of that institution. It was attested to by Floyd W. Farmer, Secretary of Wichita State University Physical Education Corporation Inc.

For convenience of the reader the defendant Wichita State University is hereafter referred to as the appellee, Wichita State University, Wichita State, WSU or the University; the defendant Wichita State University Physical

Education Corporation, Inc., is hereafter referred to as Physical Education Corporation or PEC.

Pursuant to the terms of the agreement, Golden Eagle was to provide a qualified flight crew and other ancillary services for the aircraft to be used by Wichita State in transporting the members of its football team and other personnel to scheduled games at other universities. Wichita State was to lease the aircraft described in the agreement as "One Douglas DC-6B" from a third party and to provide passenger liability insurance as prescribed by federal regulations.

On Friday, October 2, 1970, members of the Wichita State football party departed Wichita, Kansas, in two Martin 404 aircraft for Logan, Utah, for a football game with Utah State University scheduled for Saturday, October 3, 1970.

When the Martin 404 aircraft, No. N464M, took off from Denver, Colorado, an intermediate stop, it was 2,900 pounds in excess of the allowable taking-off weight as prescribed by aircraft specifications of the Federal Aviation Administration. (1 Nat'l. Trans. Safety Bd., 1028 [1971].) For those aboard that plane, the journey ended in tragedy when the plane crashed into a mountainside near Silver Plume, 16 miles west of Georgetown, Colorado.

The registered owner of the plane that crashed was Jack Richards Aircraft Company, Inc. No written agreement had been executed with respect to the lease of the plane to Wichita State for this flight. Written agreements leasing aircraft of Jack Richards to Wichita State for the first two away games of the 1970 football season had been signed by Mr. Katzenmeyer on behalf of the University. Those leases had been executed prior to each flight.

Golden Eagle Aviation, Inc., and Jack Richards Aircraft Company, Inc., were organized pursuant to the corporate laws of the state of Oklahoma. As a result of an



investigation into the operation of Golden Eagle occasioned by the plane crash, Golden Eagle's air taxi/commercial operator certificates were revoked by the Federal Aviation Administration. That revocation was sustained on appeal by the National Transportation Safety Board. (1 Nat'l. Trans. Safety Bd., 1028 [1971].)

After the plane crash, it was ascertained Wichita State had not purchased the passenger liability insurance as required in its contract with Golden Eagle. Liability insurance requirements for air taxi operators engaged in transportation are set by regulations of the Civil Aeronautics Board. (14 C.F.R. 298.41 *et seq.* Subpart D.) The minimum limits of liability coverage are seventy-five thousand dollars ($75,000) for any one passenger, and for each occurrence an amount equal to the sum produced by multiplying $75,000 by seventy-five percent (75%) of the total number of passenger seats in the aircraft. (14 C.F.R. 298.42 [*a*][1].)

On September 29, 1972, three separate lawsuits were filed. Each lawsuit involved multiple plaintiffs and named as defendants Wichita State University and the Wichita State University Physical Education Corporation, Inc. Prior to being taken into the state educational system on July 1, 1964, Wichita State was a municipally owned and operated education institution known as the University of Wichita. (K.S.A. 76-3a01, *et seq.*) As a state educational institution, the University is an agency of the state of Kansas (K.S.A. 1971 Supp 76-771 [*a*], hereafter cited and referred to as K.S.A. 1974 Supp. 76-711 [*a*]) which is controlled by and operated under the supervision of the Board of Regents. (K.S.A. 1971 Supp. 76-712, hereafter cited and referred to as K.S.A. 1974 Supp. 76-712.)

Defendant Physical Education Corporation is a nonprofit, nonstock corporation organized under the laws of the state of Kansas. The record shows this corporation was formed to conduct the business and other transactions of

the intercollegiate athletic programs of Wichita State University. During oral argument we were advised the corporation was designed to make more palatable the channeling of tax funds to support intercollegiate athletics.

In their petitions, plaintiffs alleged several causes of action which sound both in tort and contract. The tort actions are based upon theories of negligence, breach of implied and express warranty and strict liability. The contract action is based upon the third party beneficiary doctrine and relates to the failure of Wichita State to obtain liability insurance as required by the Aviation Services Agreement and pertinent federal aviation regulations. The three lawsuits were consolidated by the district court.

On December 26, 1972, defendant Wichita State moved the district court to enter summary judgment in its favor. The defendant Physical Education Corporation was not a party to that motion, nor is it a party to this appeal. Briefs were filed by the parties. Attached to Wichita State's brief were the depositions of Dr. Clark D. Ahlberg, President of the University, and Mr. Bruce Lowe, Assistant to the President for Finance and the Business Manager of Wichita State. Following a hearing on defendant's motion, the district court held: (1) the governmental immunity statutes, K.S.A. 46-901 *et seq.*, were constitutional and barred plaintiffs' tort and implied warranty claims against Wichita State, and (2) assuming for purposes of the summary judgment motion, Mr. Danielson, acting in good faith on behalf of Golden Eagle, believed Mr. Katzenmeyer to be the agent of Wichita State and authorized to enter into the Aviation Services Agreement on its behalf, the agreement was an unenforceable contract and plaintiffs could not maintain an action against the University as third party beneficiaries. From that order, plaintiffs have perfected this appeal. We reverse.

It is an established principle of contract law that a person may avail himself of a promise made by a second



party to a third party for the benefit of the first party although the first was not a party to the contract and had no knowledge of it when made. (*Keith* v. *Schiefen-Stockham Insurance Agency, Inc.*, 209 Kan. 537, 498 P. 2d 265; *Anderson* v. *Rexroad*, 175 Kan. 676, 266 P. 2d 320.) A valid and binding contract is essential to the right of the third party beneficiary to maintain such an action. (*Cory* v. *Troth*, 170 Kan. 50, 223 P. 2d 1008.) Wichita State concedes the plaintiffs are third party beneficiaries to the contract between Golden Eagle and its "customer." However, the University asserts it is not the "customer" in fact or in law. As hereafter indicated, we hold that by the express terms of the Aviation Services Agreement, and disclosures thereon, the agreement is a contract between Golden Eagle Aviation and Wichita State University. Wichita State contends, however, that as applied to the University, the agreement is not a valid and binding contract. In support of that proposition, the University advances several legal theories.

The first theory advanced by Wichita State concerns its authority and the authority of Bert Katzenmeyer to enter into the agreement. Wichita State contends it did not have the approval of the Board of Regents as required by K.S.A. 1971 Supp. 76-721, hereafter cited and referred to as K.S.A. 1974 Supp. 76-721, to execute the agreement, nor did it grant Bert Katzenmeyer authority to execute the agreement on its behalf. Wichita State maintains Mr. Katzenmeyer had authority only to execute contracts on behalf of PEC. In conjunction with this argument, Wichita State asserts a mutual mistake was made in identifying the true contracting parties in the agreement. According to the University, the parties involved knew the agreement was with PEC and not Wichita State.

Wichita State also contends it did not, nor could it, ratify the Aviation Services Agreement. Here, it points out Mr. Katzenmeyer was contracting on behalf of PEC, that he was not acting as the agent of Wichita State, that

all benefits under the agreement inured to PEC and ratification of the agreement was impossible because Wichita State lacked authority to enter into the contract unless it complied with the provisions of K.S.A. 1974 Supp. 76-721. Wichita State further contends that as an agency of the state, it cannot be estopped to deny the validity of the agreement.

The appellants contend the Aviation Services Agreement was entered into by Wichita State, that Mr. Katzenmeyer had apparent authority to execute the agreement on behalf of the University and it should be estopped from asserting Katzenmeyer's lack of authority to bind the University contractually. (K.S.A. 1971 Supp. 76-725, hereafter cited and referred to as K.S.A. 1974 Supp. 76-725.) The appellants also contend that if no agency relationship existed between the parties, this court should "pierce the corporate veil" of PEC and hold Wichita State responsible for its acts. The appellants also contend Wichita State's failure to follow statutorily required procedures regarding approval by the Board of Regents should not render a contract invalid where performance had already begun, and where there existed no indication of disapproval of the contract until after the crash. Finally, it is contended the University ratified the contract.

While this court has, on prior occasions, disregarded a corporate entity when it was necessary to promote justice or to obviate inequitable results (*Kellogg* v. *Douglas Co. Bank,* 58 Kan. 43, 48 Pac. 587; *Avery* v. *Safeway Cab, T. & S. Co.,* 148 Kan. 321, 80 P. 2d 1099; *Kilpatrick Bros., Inc.* v. *Poynter,* 205 Kan. 787, 473 P. 2d 33; *Kirk* v. *H. G. P. Corporation, Inc.,* 208 Kan. 777, 494 P. 2d 1087; *Meehan* v. *Adams Enterprises, Inc.,* 211 Kan. 353, 507 P. 2d 849; *Farha* v. *Signal Companies, Inc.,* 216 Kan. 471, 532 P. 2d 1330), we find it unnecessary to apply the alter ego doctrine here.



We are confronted in this appeal with two issues regarding the Aviation Services Agreement. First, we must determine the relationship between the three parties, Katzenmeyer, PEC, and Wichita State, and in so doing, determine who the contract is between, Golden Eagle and Wichita State, or Golden Eagle and PEC. Second, whether noncompliance with the provisions of K.S.A. 1974 Supp. 76-721 renders the agreement invalid. For the statute to apply, it is elementary that Wichita State must be a party to the Aviation Services Agreement. Accordingly, we shall consider first the relationship question.

The law recognizes two distinct types of agencies—one actual, and the other ostensible or apparent. What constitutes agency and whether there is any competent evidence reasonably tending to prove such a relationship is a question of law. (*Greep* v. *Bruns,* 160 Kan. 48, 159 P.2d 803; *Shugar* v. *Antrim,* 177 Kan. 70, 276 P. 2d 372; *Hendrix* v. *Phillips Petroleum Co.,* 203 Kan. 140, 453 P. 2d 486.)

To determine whether the record establishes an agency by agreement it must be examined to ascertain if the party sought to be charged as principal has delegated authority to the alleged agent by words which expressly authorize the agent to do the delegated act. If there is evidence of that character, the authority of the agent is express. If no express authorization is found, then the evidence must be considered to determine whether the alleged agent possesses implied powers. The test utilized by this court to determine if the alleged agent possesses implied powers is whether, from the facts and circumstances of the particular case, it appears there was an implied intention to create an agency; in which event, the relation may be held to exist, notwithstanding either a denial by the alleged principal or whether the parties understood it to be an agency. (*Rodgers* v. *Arapahoe Pipe Line Co.,* 185 Kan. 424, 345 P. 2d 702.) In 2A C.J.S., Agency, § 52, p. 626, it is stated:

"An implied agency must be based on facts for which the principal is responsible. These facts must, in the absence of estoppel, be such as to imply an intention to create the agency, and the implication must arise from a natural and reasonable, and not from a forced, strained, or distorted, construction of them. They must lead to the reasonable conclusion that mutual assent exists, and be such as naturally lead another to believe in and to rely on the agency. The existence of the relation will not be assumed.

"While the relation may be implied from a single transaction, it is more readily inferable from a series of transactions.

"On the question of implied agency, it is the manifestation of the alleged principal and agent as between themselves that is decisive, and not the appearance to a third party or what the third party should have known. An agency will not be inferred because a third person assumed that it existed, or because the alleged agent assumed to act as such, or because the conditions and circumstances were such as to make such an agency seem natural and probable and to the advantage of the supposed principal, or from facts which show that the alleged agent was a mere instrumentality.

"The existence of a valid express contract for services as an agent precludes the implication of a contract covering the same subject-matter, and resort to an express provision in a contract relative to agency precludes any determination that there was an implied agency."

The doctrine of apparent or ostensible authority is predicated upon the theory of estoppel. An ostensible or apparent agent is one whom the principal has intentionally or by want of ordinary care induced and permitted third persons to believe to be his agent even though no authority, either express or implied, has been conferred upon him. (*Greep* v. *Bruns,* supra; *Theis* v. *duPont, Glore Forgan Inc.,* 212 Kan. 301, 510 P. 2d 1212.)



Ratification is the adoption or confirmation by a principal of an act performed on his behalf by an agent which act was performed without authority. The doctrine of ratification is based upon the assumption there has been no prior authority, and ratification by the principal of the agent's unauthorized act is equivalent to an original grant of authority. Upon acquiring knowledge of his agent's unauthorized act, the principal should promptly repudiate the act; otherwise it will be presumed he has ratified and affirmed the act. (*Theis* v. *duPont, Glore Forgan Inc.,* supra, and cases cited therein.) Knowledge of the unauthorized act is essential for the principal to ratify the act, and must be shown or facts proved that its existence is a necessary inference therefrom.

The liability of a principal for the negligent acts of his agent is determined by whether the agent was engaged in the furtherance of the principal's business to such a degree that the principal had the right to direct and control the activities of the agent. (*Hughes* v. *Jones,* 206 Kan. 82, 476 P. 2d 588.) Liability of the principal is grounded upon the doctrine of *respondeat superior.* (*Jacobson* v. *Parrill,* 186 Kan. 467, 351 P. 2d 194.) The primary factor to be considered is the control which the principal has over the agent.

The function of PEC, as stated by the appellee, is to conduct the business affairs and other related transactions associated with the intercollegiate athletic programs of Wichita State. The chairman of the Board of Directors of PEC is appointed by the president of Wichita State and is a member of the University's faculty. Several other board members are either on the faculty of, or associated with, Wichita State. Those board members are also appointed by the University's president. A faculty member of the University accompanied teams of Wichita State when it participated in athletic events at other universities. Mr. Katzenmeyer was the athletic director of the University, as well as an executive for PEC, and was appointed by the president. His salary was paid by the University.

Wichita State admits Mr. Katzenmeyer was authorized to execute contracts on behalf of PEC. Moreover, the record clearly shows the president directed Katzenmeyer to award contracts for transporting its athletic teams by means of competitive bids. It is apparent from the facts the University could, and did, on several occasions, direct and control the activities of PEC. The natural, reasonable implication that arises when these and other facts are considered is that the parties intended to create an agency relationship. Accordingly, we hold PEC to be the agent of Wichita State, and that Mr. Katzenmeyer, as an officer of the corporate agent, had the implied power and authority to bind the principal—Wichita State University. Hence, Wichita State is subject to liability for any negligent acts of its corporate agent under the doctrine of *respondeat superior*.

The foregoing conclusion is not intended to prohibit interested alumni, through an individual or organized effort, from assisting in activities conducted by, or in the name of the University. We hold, however, the University cannot purposely delegate to a corporate entity, or otherwise, its responsibility for conducting intercollegiate athletic activities, directly control that corporate agent and then disclaim any liability. (K.S.A. 1974 Supp. 76-725.) Moreover, the facts disclose the University maintained such a close relationship with PEC so that it could be considered a mere instrumentality of the University.

Wichita State contends noncompliance with the provisions of K.S.A. 1974 Supp. 76-721 renders the Aviation Services Agreement invalid. We do not agree. K.S.A. 1974 Supp. 76-721 reads:

> "The board of regents, or any university or college with the approval of the board of regents, may enter into contracts with any party or parties including any agency of the United States or any state or any subdivision of any state or with any person, partnership or corporation if the purpose of such contract is related to the operation or function of such board or institution. If such contract is with a corporation whose operations are substantially controlled by the board of any college or university, such contract shall provide that the books and records of such corporation shall be public records and shall require an annual audit by an independent certified public accountant to be furnished to the board of regents and filed with the state agency in charge of post auditing state expenditures."



Wichita State argues the statute is mandatory and its clear, concise language requires that a university must have approval of the Board of Regents before entering into any contract, and the Board of Regents did not approve the Aviation Services Agreement. Absent such approval, the appellee contends, the contract is void and unenforceable.

No absolute tests exist by which it may be determined whether a statute is directive or mandatory. Each case must stand largely on its own facts, to be determined on an interpretation of the particular language used. (*Wilcox* v. *Billings*, 200 Kan. 654, 438 P. 2d 108; *State* v. *Brown*, 205 Kan. 457, 470 P. 2d 815.) It can be said the Legislature does not intend any statutory provision to be totally disregarded. If the consequences of not obeying a particular statute are not prescribed by the Legislature, then this court must decide the consequences. (*City of Kansas City* v. *Board of County Commissioners*, 213 Kan. 777, 518 P. 2d 403.)

The Legislature has delegated to the Board of Regents the authority to control, operate, manage and supervise the universities and colleges of this state. "For such control, operation, management or supervision, the board of regents may make contracts and adopt orders, policies or rules and regulations and do or perform such other acts as are authorized by law or are appropriate for such purposes." (K.S.A. 1974 Supp. 76-712.) The provisions of K.S.A. 1974 Supp. 76-721 fix a method of procedure in-

tended to secure order, system and dispatch in contracting with state educational institutions. Its provisions are directive, and as such, require implementing rules or regulations by the Board of Regents. No policy, rule or regulation of the Board of Regents has been cited or furnished to this court regarding contract matters, and none can be found in the Kansas Administrative Regulations. Wichita State asserts the contracting procedure of the University is to have a contract for goods or services first approved by a designated person at the University, then approved by the Department of Administration (K.S.A. 1974 Supp. 75-3701 *et seq.*) and thereafter to have it approved by an attorney of that department. Nowhere in this procedure is approval by the Board of Regents found. If the Board of Regents desires to establish guidelines in contractual matters for state educational institutions it may do so. However, absent any such rules or regulations, Wichita State cannot use the statute to deny the validity of the Aviation Services Agreement following execution and partial performance. Common honesty forbids repudiation now. (*Municipal Power Transmission Co.* v. *City of Lyndon,* 127 Kan. 59, 272 Pac. 158.)

We make one final observation on these points. As indicated, Wichita State has contended in this appeal that Mr. Katzenmeyer did not have the authority to bind the University, but only authority to contractually obligate PEC. It maintains the Aviation Services Agreement is between Golden Eagle and PEC. It also contends absent the statutorily required approval of the Board of Regents, the contract is void and unenforceable.

Broad authority is granted the Board of Regents in its control, operation and management of this state's universities and colleges. See *Murray* v. *State Board of Regents,* 194 Kan. 686, 401 P. 2d 898; K.S.A. 1974 Supp. 76-712. Likewise, the chief executive officer of each university or college is given broad administrative authority with re-



spect to the affairs of his institution, and extensive power is granted to delegate any part of his authority or any of his duties. (K.S.A. 1974 Supp. 76-725.)

Today, the use of separate corporate entities in collegiate athletics appears to be common, perhaps widespread, but indeed shadowy as to involvement and responsibility. Whether such arrangements should continue is not a question for this court. But when the involvement is such as presented in the instant case, then it begs logic to hold no agency relations exist, and that the principles thereof do not apply. Performance under the contract had begun and payments made; this constituted tacit, effective approval of the aviation agreement contract. See *Taylor* v. *Fee,* 233 F. 2d 251, 258 (7th Cir. 1956).

The sympathy extended to those who felt the impact of this tragedy is now but a memory. The appellants now stand before this court seeking the right to redress their injuries by due course of law. They have found in their quest that such right is barred by K.S.A. 46-901. Alone, they now assail the validity of that barrier, and present to this court multiple challenges as to its constitutionality. We now resolve those challenges and in so doing hold the doctrine of governmental immunity codified in K.S.A. 46-901 to be constitutionally impermissible.

The historical origin of the governmental immunity doctrine is found in the English case of *Russell* v. *Men of Devon,* 2 T. R. 667, 100 Eng. Rep. 359 (1788). From that decision there evolved three distinct common-law doctrines, two favoring public entities and the other favoring public officials. The doctrines of governmental and sovereign immunity were held to exempt governmental entities from privately instituted civil suits without the express consent of the sovereign. Those doctrines were founded upon the beliefs the courts, which derived their power from the sovereign, could not have been empowered to enforce such authority against the sovereign or extensions thereof; that

the king could do no tortious wrong, nor could he authorize such conduct while acting in his sovereign capacity, for no man can do by his agents and officers that which he cannot do by himself. In denying vicarious liability for torts, those doctrines represented a significant departure from the common-law doctrine of *respondeat superior*. (Borchard, Government Liability in Tort, 34 Yale L. J. 1 [1924-25]; Borchard, Government Responsibility in Tort, 36 Yale L. J. 1039 [1927]; Jaffe, Suits Against Governments and Officers; Damage Actions, 77 Harv. L. Rev. 209 [1963].) Under the doctrine of immunity for governmental officers, the common law recognized the necessity of permitting public officials to perform their official duties free from the threat of personal liability. (*Kretchmar* v. *City of Atchison*, 133 Kan. 198, 299 Pac. 621; *Gresty* v. *Darby*, 146 Kan. 63, 68 P. 2d 649; *Cunningham* v. *Blythe*, 155 Kan. 689, 127 P. 2d 489.)

Although early decisions of this court, *City of Topeka* v. *Tuttle*, 5 Kan. 186 [°311]; *City of Atchison* v. *King*, 9 Kan. 550; *City of Atchison* v. *Challis*, 9 Kan. 603; *City of Ottawa* v. *Washabaugh*, 11 Kan. 102 [°124]; *City of Wyandotte* v. *White*, 13 Kan. 146 [°191], were related to the liability of government, we first recognized the immunity doctrine in *Eikenberry* v. *Township of Bazaar*, 22 Kan. 389 [°556]. The principal question presented in *Eikenberry* was whether a township was liable for injuries caused by an unsafe or defective highway. Finding the township to be a quasi corporation existing only for the purposes of the general political government of the state, we held the township immune from suit. Chief Justice Horton wrote the opinion for the court, and said:

> ". . . [A]ll the powers with which [the townships] are intrusted are the powers of the state, and all the duties with which they are charged are the duties of the state; that in the performance of governmental duties, the sovereign power is not amenable to individuals, and therefore these organizations are not liable at the common law for such neglect, and can only be made liable by statute. . . ." (l. c. 391, ° 561.)



As originally applied, the doctrine conferred absolute immunity upon the state and its extensions except in cases where consent had been given. Thereafter, to temper the harshness of the immunity doctrine, we began to restrict or withdraw its application in certain areas, and in so doing, created exceptions to the immunity concept. We held municipalities of this state immune in the performance of governmental functions, but liable for tortious actions resulting from functions proprietary in nature. (*Hinze* v. *City of Iola*, 92 Kan. 779, 142 Pac. 947; *Water Co.* v. *City of Wichita*, 98 Kan. 256, 158 Pac. 49; *Krantz* v. *City of Hutchinson, et al.*, 165 Kan. 449, 196 P. 2d 227, 5 A. L. R. 2d 47; *Wendler* v. *City of Great Bend*, 181 Kan. 753, 316 P. 2d 265; *Grover* v. *City of Manhattan*, 198 Kan. 307, 424 P. 2d 256.) Municipalities also were held liable for the creation and maintenance of a nuisance (*Steifer* v. *City of Kansas City*, 175 Kan. 794, 267 P. 2d 474; *Lehmkuhl* v. *City of Junction City*, 179 Kan. 389, 295 P. 2d 621, 56 A. L. R. 2d 1409; *Galleher* v. *City of Wichita*, 179 Kan. 513, 296 P .2d 1062; *Adams* v. *Arkansas City*, 188 Kan. 391, 362 P. 2d 829) and liable for failing to keep streets reasonably safe for public purposes. (*City of Ottawa* v. *Washabaugh*, supra; *City of Wyandotte* v. *White*, supra; *Loftin* v. *City of Kansas City*, 164 Kan. 412, 190 P. 2d 378; *Smith* v. *City of Emporia*, 169 Kan. 359, 219 P. 2d 451; *Perry* v. *City of Wichita*, 174 Kan. 264, 255 P. 2d 667; *Grantham* v. *City of Topeka*, 196 Kan. 393, 411 P. 2d 634.)

Our holding in *Carroll* v. *Kittle*, 203 Kan. 841, 457 P. 2d 21, is the high-water mark of our decisions restricting the application of the immunity doctrine in Kansas. There, the plaintiff, an oil field worker, had caught his arm in a drilling rig. He was rushed to the University of Kansas Medical Center where his partially severed left arm was reattached by a team of doctors. Eight days after the surgery, the

plaintiff, while in a disoriented state, ripped off the heavy bandages and splints from the injured arm. His arm was rewrapped by the night resident surgeon and the incident was recorded on his hospital chart. In the early morning hours on the tenth day of his recovery, the plaintiff was discovered with the bandages ripped completely off, tearing at his injured arm. The damage done on the second occason was so extensive the arm had to be amputated.

Plaintiff was a private patient at the medical center and paid all charges for his hospitalization. He filed suit alleging the self-inflicted injury and resulting loss of his left arm was directly and proximately caused by the negligence and carelessness of the defendant Kittle, the members of the Board of Regents of the state of Kansas, and their agents, servants and employees. Kittle, plaintiff's doctor, was a staff physician who also conducted a private medical practice at the medical center. The only issue presented on appeal was whether the doctrine of sovereign immunity was applicable.

In the opinion this court departed from the term "sovereign immunity" and merged that concept into the applicable term "governmental immunity." Moreover, we acknowledged that inequality of the immunity doctrine as it had been applied. We held the responsibility of the various governmental agencies should be equalized by the elimination of all governmental immunity from negligence when the state or its agencies are engaged in a private or proprietary function.

In *Carroll* we recognized again the Legislature had authority in the field of governmental immunity. But such recognition cannot validate that which contravenes the federal and Kansas Constitutions. There, we said:

> ". . . [I]n abolishing governmental immunity to the extent suggested, we want it clearly understood that we recognize the authority of the legislature to control the entire field including that part covered by this



> opinion. *We would suggest that the legislature is in a much better position than this court to restrict the application of the doctrine because it can supplement the restriction with proper legislation* in the form of provisions for insurance, etc. . . ." (l. c. 848.) (Emphasis supplied.)

The legislative response to this court's invitation to restrict the immunity doctrine is found in part in K.S.A. 46-901, 902. The statutes provide:

> "46-901. Governmental immunity of state; implied contract, negligence or other tort; notice in state contracts. (*a*) It is hereby declared and provided that the following shall be immune from liability and suit on an implied contract, or for negligence or any other tort, except as is otherwise specifically provided by statute:
>
> "(1) The state of Kansas; and
>
> "(2) boards, commissions, departments, agencies, bureaus and institutions of the state of Kansas; and
>
> "(3) all committees, assemblies, groups, by whatever designation, authorized by constitution or statute to act on behalf of or for the state of Kansas.
>
> "(*b*) The immunities established by this section shall apply to all the members of the classes described, whether the same are in existence on the effective date of this act or become members of any such class after the effective date of this act.
>
> "(*c*) The state of Kansas and all boards, commissions, departments, agencies, bureaus and institutions and all committees, assemblies and groups declared to be immune from liability and suit under the provisions of subsection (*a*) of this section shall, in all express contracts, written or oral, with members of the public, give notice of such immunity from liability and suit. [L. 1970, ch. 200, § 1; March 26.]
>
> "46-902. Nonapplication to local units of government. (*a*) Nothing in section 1 [46-901] of this act shall apply to or change the liabilities of local units of government including (but not limited to) counties,

cities, school districts, community junior colleges, library districts, hospital districts, cemetery districts, fire districts, townships, water districts, irrigation districts, drainage districts and sewer districts, and boards, commissions, committees, authorities, departments and agencies of local units of government.

"(*b*) The provisions of section 1 [46-901] of this act shall not create any liability not now existent according to law, nor effect, change or diminish any procedural requirement necessary for recovery from any local unit of government. [L. 1970, ch. 200, § 2; March 26.]"

By the above enactments, the law of governmental immunity in Kansas reverted back to its status prior to our decision in *Carroll.* Subsequent decisions of this court (*Woods* v. *Kansas Turnpike Authority,* 205 Kan. 770, 472 P. 2d 219; *Daniels* v. *Kansas Highway Patrol,* 206 Kan. 710, 482 P. 2d 46; *Allen* v. *City of Ogden,* 210 Kan. 136, 499 P. 2d 527) have been in accord with the immunity doctrine as codified, the exceptions thereto under the common law, and the several legislative inroads. (K. S. A. 68-301; K. S. A. 68-419; K. S. A. 68-2015; K. S. A. 1974 Supp. 12-2601-2614; K. S. A. 72-8404-8415 as amended K. S. A. 1974 Supp. 72-8416, 8417; K. S. A. 74-4707-4713.) For example, in *Woods* v. *Kansas Turnpike Authority,* supra, we were confronted with the question whether the Turnpike Authority was immune from liability for personal injuries resulting from the creation or maintenance of a nuisance. In sustaining that immunity, we said:

"*. . . We . . . decline to engraft solely for plaintiff's benefit the nuisance exception to the immunity previously accorded the Kansas turnpike authority under our law as it existed prior to Carroll.*" (l. c. 774.) (Emphasis supplied.)

Prior to our decision in *Carroll* the common-law immunity concept was attacked from time to time as violating constitutional guarantees. (*McCoy* v. *Board of Regents,*



196 Kan. 506, 413 P. 2d 73; *Caywood* v. *Board of County Commissioners,* 194 Kan. 419, 399 P. 2d 561.) In *Carroll* we judicially altered the immunity doctrine so that it applied uniformly to all units of government, and thereby nullified prior decisions holding that immunity, as a court-made rule, was permissible as an exception which did not violate constitutional concepts.

We are not called upon in the instant case to except again from the immunity doctrine as in *Woods,* nor can we consider judicially terminating the doctrine as in *Carroll.* Here, we are presented with multiple challenges to the constitutionality of the doctrine of governmental immunity as set forth in K. S. A. 46-901, 902.

Neither the United States Constitution nor the Kansas Constitution confer immunity upon this state. (*Cohens* v. *Virginia,* 19 U. S. 120 [° 264], 5 L. Ed. 257; *Carroll* v. *Kittle,* supra.) Both Constitutions are paramount law within their separate spheres. (*Atkinson* v. *Woodmansee,* 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325; *Ex Parte Young,* 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441.) As the guardian of the principles embodied in the Constitutions, it is within our inherent power, and our duty, to determine the constitutionality of the legislation in question. (*Tri-State Hotel Co.* v. *Londerholm,* 195 Kan. 748, 408 P. 2d 877.) With this background, we turn to the arguments presented.

The appellants contend K. S. A. 46-901 denies them equal protection of the law. The equal protection clause of the Fourteenth Amendment to the United States Constitution finds its counterpart in Sections 1 and 2 of the Bill of Rights of the Kansas Constitution. Sections 1 and 2 declare that "all men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness," and that "all free governments . . . are instituted for their equal protection and benefit." (*Manzanares* v. *Bell,* 214 Kan. 589, 522 P. 2d 1291; *Henry* v. *Bauder,* 213 Kan. 751, 518 P. 2d 362.) Neither the equal

protection clause of the Fourteenth Amendment nor Sections 1 and 2 of the Kansas Bill of Rights deny the Legislature the power to create distinct classifications of persons in different ways. Any distinction inherent in a particular classification must have a proper and reasonable basis for such classification. (*Pinkerton* v. *Schwiethale*, 208 Kan. 596, 493 P. 2d 200.)

Presently the state and all of its agencies have absolute immunity "from liability and suit, on an implied contract, or for negligence or any other tort, except as is otherwise specifically provided by statute." (K. S. A. 46-901.) A county, an auxiliary agency of the state, is immune from liability unless such liability is expressly imposed by statute, or necessarily implied therefrom. (*Caywood* v. *Board of County Commissioners*, supra; K. S. A. 46-902.) A city is liable for tortious conduct when engaged in proprietary activities, but enjoys immunity while engaged in governmental activities except for the creation and maintenance of a nuisance and the failure to keep streets reasonably safe. (*Grantham* v. *City of Topeka*, supra; *Grover* v. *City of Manhattan*, 198 Kan. 307, 424 P. 2d 256; K. S. A. 46-902.)

Under the foregoing, persons injured by a governmental entity are classified, solely by the type of the governmental entity involved. Their right to redress and the remedies available, if any, to them are dependent solely upon this classification. Prior to the enactment of K. S. A. 46-901, 902, we expressed our concern as to the reasonableness of so classifying persons injured by governmental units or agencies. In *Wendler* v. *City of Great Bend*, supra, Mr. Justice Schroeder expressed this court's concern as follows:

> "The State is usually deemed immune regardless of the kind of function it is performing. What justifies the difference between the State and its munipical subdivisions is baffling. The decisions seem to result from accident rather than from reason, and tend to make



> one question the entire rationale of the principle. For example: Consider the liability of a city to a pedestrian injured by the negligence of a city employee operating a pick-up truck under the supervision of the Water Department, and the nonliability of a city on the same facts where the truck is under the supervision of the Fire Department." (l. c. 759.)

In *Carroll* we again emphasized our concern as to this irrational classification and sought to equalize responsibility. In the opinion it was said:

> "... It is difficult for the majority of the court to see why one governmental agency performing precisely the same acts—*e. g.*, operating a hospital for profit—should be liable for negligence and others should not." (l. c. 847.)

Wichita State vigorously contends that practical and important distinctions exist for the classifications made by K. S. A. 46-901, 902. We can find none. A person's right to redress by due course of law does not become less worthy of protection because he or she was injured by a particular governmental unit. Nor does such person's right to compensation become any the less worthy because of the type of a governmental unit involved. Under present Kansas law, no regard is given to the injury or the facts and circumstances surrounding the events which caused the injury—it is the type of governmental agency and the activity in which it is engaged that determines whether the aggrieved party will find the doors of the court open or closed. Such a classification is forced and unreal, and greater burdens are imposed on some than others of the same desert. We find the classifications contained in K. S. A. 46-901, 902 are not only "baffling," but arbitrary, discriminatory and unreasonable.

The doctrine of governmental immunity is an historical anachronism which manifests an inefficient public policy and works injustice upon everyone concerned. The doc-

trine and the exceptions thereto operate in such an illogical manner as to result in serious inequality. Liability is the rule for negligent or tortious conduct, immunity is the exception. But when the tortfeasor is a governmental agency immunized from liability, the injured person must forego his right to redress unless within a specific exception. Equality is not achieved by artificial exceptions which indiscriminately grant some injured persons recourse in the courts and arbitrarily deny such relief to others. (*Winters* v. *Myers,* 92 Kan. 414, 140 Pac. 1033.) The operative effect of such arbirtrary distinctions is incompatible with the constitutional safeguards established by both the federal and Kansas Constitutions. Accordingly, we hold K. S. A. 46-901, 902 are unconstitutional and void as a denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights.

Appellants next contend K. S. A. 46-901, 902 deny them due process of law under the Fourteenth Amendment to the United States Constitution and violate Section 18 of the Kansas Bill of Rights. We shall consider first the due process contention.

The political truths contained in Sections 1 and 2 of the Kansas Bill of Rights, previously quoted, have been held by this court to have the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law. (*Tri-State Hotel Co.* v. *Londerholm,* supra; *Henry* v. *Bauder,* supra.)

A fundamental aspect of our cohesive society is its system of laws defining the rights and duties of its members. By virtue of such a system, our citizens are able to govern their individual affairs in an orderly manner, and definitively settle their differences. The concept of due process of law is a strategic and central necessity in our system of jurisprudence. It is this concept, embodied in both the federal and Kansas Constitutions, that guarantees one



will not arbitrarily be deprived of his rights, liberty or property.

To say the governmental immunity statutes in question subvert the concept of due process is but to state the obvious, for that doctrine blocks access to our courts to those seeking redress for injuries occasioned by the negligent act of a governmental entity. In the instant case, the appellants have been summarily excluded from our courts—the only forum empowered by the people to redress their grievances by due process of law. In this posture, we must determine whether the legislation before this court bears a reasonable relation to a permissible legislative objective. (*Manzanares* v. *Bell,* supra; *City of Colby* v. *Hurtt,* 212 Kan. 113, 509 P. 2d 1142.)

The rationale upon which the theory of governmental immunity rests has been the subject of much debate. The doctrine, born of expediency, represents an expression of the Eighteenth Century philosophy that "it is better that an individual should sustain an injury than the public shall suffer an inconvenience." (*Russell* v. *Men of Devon, op. cit.,* supra.) In an historical perspective, the doctrine is said to rest upon forestalling "an infinity of actions" and the reluctance of the court to divert public funds "out of which satisfaction is to be made" for private injury. (*Russell* v. *Men of Devon, op. cit,* supra.)

We considered those objectives in *Carroll,* and said:

> "We do not subscribe to the theory that sovereign immunity in the United States, and in the individual states, is traceable to the medieval concept that 'the king can do no wrong.' Our forefathers did not fight the Revolutionary War because they were of that opinion. Their reasoning was quite the contrary. It is difficult for us to believe that they would carry over into their common law a principle so opposed to their basic belief. (See *Wendler* v. *City of Great Bend,* 181 Kan. 753, 316 P. 2d 265.)

> "No doubt the absolute monarchs of the past, and the dictators of today, refused and still refuse to be charged with wrong, but that is no reason why our representative and democratic forms of government should be so classified. We think the rule was adopted in this country as a convenience to a sovereign people. Under our form of government the legal sovereignty is in the people, and the people, in the exercise of their governmental power, through the states, did not wish to be sued and harassed in carrying out their governmental functions. . . ." (l. c. 846.)

We do not subscribe to the belief that convenience is a pervasive legislative objective sufficient to totally deprive the appellants access to the courts. Convenience is completely unacceptable as a standard by which to balance the rights of an individual against the interest of the state. Convenience should not outweigh an individual's right to be compensated for actual damages sustained and injuries suffered. (*Muskopf* v. *Corning Hospital Dist.*, 55 C. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457.) To hold convenience is a permissible legislative objective, sufficient to insulate the government from negligence, is to engage in incredulous reasoning, void of logic, which undermines the very principles upon which this nation was founded.

Nor do we find the threat of multiple lawsuits a tenable basis by which the appellants can be denied access to the courts of this state. The threat of "an infinity of actions" is but a monument of shallow reasoning utilized to thwart necessary changes in the law. No individual can match the state's vast resources. Undoubtedly there will be those who shall seek unnecessarily to avail themselves of the access we now provide. That problem, however, can be resolved either by the demands of the law—demands which must be fulfilled before recovery can be secured—or by enactment by the Legislature of an adequate Tort Claims Act. We find it impermissible to deny appellants access to the courts as a means of forestalling spurious actions.



In reality, it is most probably the last rationale, that of diverting public funds to compensate for private injury, which has kept the doors of the courts closed for so long. The error of this rationale lies in the speculation from which it is borne. We have in the past alleviated this fear by permitting limited exceptions to the doctrine of governmental immunity. Moreover, where the act complained of was within a specific exception, the requirements of the law eliminated any such fear. It is the law and its requirements, which must, and will, insure the public monies are not diverted unnecessarily. (See *Martin* v. *State Highway Commission,* 213 Kan. 877, 518 P. 2d 437.)

In an article by Lawrence E. Blades, 16 Kan. L. Rev. 265, entitled "A Comment on Governmental Tort Immunity in Kansas" appears the following:

> ". . . The fear that the removal of immunity would lead inevitably to financial embarrassment and thus the disruption of government has often been expressed. But this fear is more fanciful than real. The Federal government and a number of states have adopted and operated under more or less comprehensive rules of governmental responsibility in tort without any meaningful symptom of resultant or impending financial ruin. So, too, have a number of foreign countries. . . ." (p. 268.)

Note, Governmental Tort Immunity in Kansas, 10 Washburn L. J. 59; Comment, Governmental Immunity in Kansas: Prospects for Enlightened Change, 19 Kan. L. Rev. 211; Van Alstyne, Governmental Tort Liability: A Decade of Change, 1966 U. Ill. L. F. 919.

The elasticity of the due process concept has occasioned much debate, and "controversies have raged about the cryptic and abstract words" of that guarantee. (*Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652.) But if due process is to be secured, the law must operate alike upon all and not subject the few

to the arbitrary exercise of governmental power. Every citizen of this state has a right to be protected by the government in the enjoyment of his life, liberty and property. To that end elaborate safeguards are to be found in the law. The life and liberty the state may not take directly, it cannot take indirectly, for a "grant of power by the public is never to be interpreted as a privilege to injure." (*Drainage District* v. *Railway Co.*, 99 Kan. 188, 161 Pac. 937.)

In sum, we find K. S. A. 46-901, 902 do not bear a reasonable relation to a permissible legislative objective. We hold those statutes transgress upon the guarantee of due process of law as provided in the Fourteenth Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights.

We now consider the argument regarding Section 18 of the Kansas Bill of Rights. That section provides:

> "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

In *Noel* v. *Menninger Foundation,* 175 Kan. 751, 267 P. 2d 934, this court held the common-law doctrine of charitable immunity was constitutionally impermissible. The oft-quoted words of Mr. Justice Wertz as to the rights guaranteed by Section 18, and stated in *Noel* follow:

> ". . . The constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person or property means that for such wrongs that are recognized by the law of the land the court shall be open and afford a remedy, or that laws shall be enacted giving a certain remedy for all injuries or wrongs. 'Remedy by due course of law,' so used, means the reparation for injury ordered by a tribunal having jurisdiction in due course of procedure after a fair hearing. It is the primary duty of the courts to safeguard the declaration of right and remedy guaranteed by the constitutional provision insuring a remedy for all injuries. . . ." (l. c. 763.)



Moreover, in *Noel* we used language appropriate to this case:

> "To exempt charitable and nonprofit corporations from liability for their torts is plainly contrary to our constitutional guaranties (Bill of Rights, § 18). It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens. It undertakes to clothe charitable and nonprofit organizations with special privileges denied to other corporations, and society. It takes from individuals the right to assert in the courts claims against all who tortiously assail their person and property and to recover judgment for injuries done. It prevails all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged charitable, nonprofit organizations. It frees one set of corporations from obligations to which their competitors and individuals, are subjected. In short, it destroys equality and creates special privilege. [Citation]." (l. c. 763.)

We reach the same conclusion with respect to governmental immunity. As observed, the immunity statute creates a class which this court has said to be without a rational basis. Here, as in the case of charitable immunity, certain favored governmental units are selected arbitrarily to be immune from civil wrongs. (*Wendler* v. *City of Great Bend,* supra; *Carroll* v. *Kittle,* supra.)

K. S. A. 46-901, 902 take from the individual the right to assert in a court of law claims against state governmental units which by tortious conduct have injured his person. They prevent *all* persons having a claim against such agencies from having recourse at law for vindication of rights or reparation for the wrongs. Those statutes, like the common-law doctrine, deprive the injured party from bringing an action to remedy the injury unless insurance

has been purchased and the state's immunity specifically waived. See, K. S. A. 74-4701-4716; *Mott, Executor* v. *Mitchell,* 209 Kan. 476, 496 P. 2d 1297; *Allen* v. *City of Ogden,* supra, pp. 138, 139.

In the instant case, had the prescribed insurance been purchased as required by the contract and pertinent Federal law and regulations we would not be called upon to resolve the constitutional challenge presented. Notwithstanding this fact, the appellee contends it is not liable under the immunity doctrine. Governmental immunity was not established to condone the deliberate failure of governmental bodies to comply with the law. In sum, the doctrine of governmental immunity destroys equality and creates special privileges.

We also note another similarity between the *Noel* case and the instant case. In the aftermath of *Noel,* the Legislature enacted a statute (K. S. A. 1959 Supp. 17-1725) which rendered the property of a class of corporations (including hospitals operated on a nonprofit basis) immune from process. The effect of that statute was to reinstate the immunity doctrine as to the negligent acts of some charitable institutions. In *Neely* v. *St. Francis Hospital & School of Nursing,* 192 Kan. 716, 391 P. 2d 155, that statute was challenged, and the sole issue was whether it violated Section 18. Our decision in *Neely* indicates the importance this court attached to the duty articulated in *Noel.* In holding the statute unconstitutional, this court re-emphasized the importance of the rights and remedies guaranteed all by Section 18, and said:

> "Despite the clarity of the admonition contained in the foregoing [*Noel*] opinion, with reference to the constitutional guaranties protecting *remedies* for injury to person, reputation or property, the legislature, no doubt at the request of certain corporations organized not for profit and which operate or support one or more hospitals, operated on a nonprofit basis, adopted 17-1725, *supra.*" (l. c. 720.)



In both instances the doctrines (*i. e.,* charitable immunity in *Noel* and governmental immunity in the case at bar) were judicially created to avoid liability for tort. Both immunities were overturned by this court (charitable immunity in *Noel* and governmental immunity in *Carroll*) and were both reimposed by the Legislature. We emphasize that in *Neely* this court refused to allow the Legislature to accomplish an unconstitutional result in view of our prior ruling on the subject. *The same result necessarily follows in the case at bar.* Notwithstanding the Legislature's response to our invitation in *Carroll* to delineate governmental liability for its tortious acts, we are not restrained in putting the legislative response to a constitutional test. Nor does our conclusion in *Woods* that sound policy precludes further judicial inroads into the Legislature's comprehensive statement on governmental immunity bind this court since the statute's constitutional validity was not there in issue. See *State* v. *Hill,* 189 Kan. 403, 409, 410, 369 P. 2d 365, 91 A. L. R. 2d 750.

Finally, in *Sanders* v. *State Highway Commission,* 211 Kan. 776, 508 P. 2d 981, we were confronted with a claim of immunity by the highway commission in an inverse condemnation action. Historically, inverse condemnation actions have been categorized by this court to be based upon an implied contract. Thus, according to the highway commission, inverse condemnation actions were within the scope of K. S. A. 46-901 unless "otherwise specifically provided by statute." We responded to this argument as follows:

> "If the provisions of K. S. A. 1972 Supp. 46-901 *et seq.* [K. S. A. 46-901] were intended by the legislature to place the cloak of governmental immunity around suits in the nature of inverse condemnation it becomes the duty of this court to safeguard the declaration of the right and the remedy guaranteed by the constitution and we must then declare the statute unconstitutional. (*Noel* v. *Menninger Foundation,* 175

Kan. 751, 267 P. 2d 934; *Neely* v. *St. Francis Hospital & School of Nursing,* 192 Kan. 716, 391 P. 2d 155.)" (l. c. 787.)

Section 18 protects persons as well as property. Had the court been required in *Sanders* to enforce the guarantees of Section 18 as it relates to property, it is evident we would not have hesitated to do so. Are the rights of an individual worthy of less protection? We think they are not.

All powers of our government are derived from the people. Their source, indeed their reservoir of strength, is in the people. For this court to now hold that governmental immunity as declared in K. S. A. 46-901, 902 does not contravene Section 18 as applied to the rights of individuals would be tantamount to construing that section as affording greater protection to property than to an individual. In so doing, we would imbed in our present law the evaluation of the individual and his property which prevailed in the early development of the common law. This would be unwise, for, as we said in *Steel* v. *Latimer,* 214 Kan. 329, 332, 521 P. 2d 304, "the principle of change runs deeply through human history and like a golden thread weaves new 'people requirements' into the fabrics of altered social patterns." We hold K. S. A. 46-901, 902 violate the guarantees declared in Section 18 of the Bill of Rights of the Constitution of the state of Kansas.

Having declared the doctrine of governmental immunity as codified in K. S. A. 46-901, 902 to be constitutionally void, equality returns in regard to the responsibility of all levels of government in this state when engaged in proprietary activities. However, by equalizing responsibility we are confronted with the final question presented in this appeal. Is the transporting of football players, university personnel and interested alumni to a scheduled intercollegiate away football game a governmental or proprietary function?



On this point, the arguments of the parties are quite simple. Appellants contend the transporting of athletes and other personnel is a proprietary function; Wichita State contends it is a governmental function. According to Wichita State, the colleges and universities of this state are created exclusively for the purpose of providing educational facilities in which the state system of higher public education is administered. Hence, it maintains that all authorized functions of the state universities are governmental in character.

While we agree with the suggestion regarding the purpose of this state's colleges and universities, we find the syllogism proffered by the University to be an overly broad, generalized conclusion.

The governmental and proprietary distinction is one of classic limitation of the common law to restrict the doctrine of governmental immunity. As initially applied by this court, the governmental-proprietary distinction related only to municipalities. (*State* v. *Water Co.,* 61 Kan. 547, 60 Pac. 337; *Freeman* v. *Chanute,* 63 Kan. 573, 66 Pac. 647; *Hinze* v. *City of Iola,* 92 Kan. 779, 142 Pac. 947; *City of Wichita* v. *Railroad & Light Co.,* 96 Kan. 606, 152 Pac. 768; *McCormick* v. *Kansas City,* 127 Kan. 255, 273 Pac. 471; *McGinley* v. *City of Cherryvale,* 141 Kan. 155, 40 P. 2d 377; *Snook* v. *City of Winfield,* 144 Kan. 375, 61 P. 2d 101.) The basis permitting this distinction was the proposition that municipalities exist and function in a dual capacity—one being governmental, and the other proprietary. (*Water Co.* v. *City of Wichita,* 98 Kan. 256, 158 Pac. 49; *Rose* v. *City of Gypsum,* 104 Kan. 412, 179 Pac. 348.)

In *Carroll* we reversed our holding in *McCoy* v. *Board of Regents,* 196 Kan. 506, 413 P. 2d 73, that the proprietary function exception to the immunity doctrine was not applicable to either counties or the state. We held in *Carroll* that all levels of government have the same responsibility for torts when engaged in private or proprietary functions.

Today, the task of classifying a particular activity as either proprietary or governmental is far more difficult than it was when the distinction was first applied. As the reach of government has expanded, it has become more and more difficult to ascertain whether an activity admits to being a proprietary function. In *Krantz* v. *City of Hutchinson, et al.,* 165 Kan. 449, 196 P. 2d 227, 5 A. L. R. 2d 47, we reviewed several definitions of proprietary functions. In that case we held governmental functions are performed for the general public, with respect to the common welfare and for the exercise of which it receives no compensation or particular benefit, while proprietary functions are exercised for some specific benefit or advantage to the corporation or those comprising the local urban community.

In *Grover* v. *City of Manhattan,* 198 Kan. 307, 424 P. 2d 256, we held the applicable test to be as follows:

> "In determining whether activities of a municipality are governmental or proprietary, it is proper to consider whether the activity is primarily for the advantage of the *state as a whole* or for the *special local benefit* of the community involved, and to further consider whether the activity is in performance of a *duty imposed upon* the municipality by the sovereign power, or is in the exercise of a *permissive privilege* granted by the sovereign power; *but such tests are not conclusive* in determining the capacity in which the city's activities are conducted. (Citation.)" (Syl. ¶ 1.)

Thereafter, in *Carroll* we held a governmental agency is engaged in a proprietary activity when it embarks on an enterprise which is commercial in character *or* is usually carried on by private individuals *or* is for the profit, benefit or advantage of the governmental unit conducting the activity. (Syl. ¶ 7.)

The above tests clearly illustrate the problem inherent in the governmental-proprietary distinction—that of defining a proprietary function. The cases attempting to resolve this problem are legion, and are replete with con-



flicts and inconsistencies. Moreover, when an activity partakes of both governmental and proprietary characteristics, the problem of categorizing that activity becomes even more uncertain. The end result of such conflicts and uncertainties is that "shadowy distinctions between governmental functions and proprietary affairs . . . have been used to decide cases, all without much rhyme or reason. . . ." (*Wendler* v. *City of Great Bend*, 181 Kan. 753, 758, 316 P. 2d 265.)

Nevertheless, we believe the governmental-proprietary distinction still has vitality. Implicit in the distinction is the recognition that it "is not a tort for government to govern." (Jackson, J., dissenting in *Dalehite* v. *United States,* 346 U. S. 15, 57, 97 L. Ed. 1427, 73 S. Ct. 956.) Depending upon the facts and circumstances involved, the distinction can serve either to place government in the shoes of the private tortfeasor, or to limit government liability. For example, under the distinction the state is not exposed to liability as to legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial cast. Nor is the state liable in matters involving the exercise of official judgment or discretion. (*Willis, et al.* v. *Dept. of Cons. & Ec. Dev.,* 55 N. J. 534, 264 A. 2d 34. See *Wood* v. *Strickland,* 420 U. S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 [1975].)

We believe the problem in applying the governmental-proprietary distinction lies in attempting to set forth a precise definition of the terms. We have previously stated that no single test is determinative of whether a particular function is governmental or proprietary. (*Grover* v. *City of Manhattan,* supra.) In view of the expanding reach of government today, it is time the liability exposure of governmental units be determined in conjunction with the total facts and circumstances involved. Such a determination will have to be made on a case by case basis. We do not attempt in this opinion to express an ultimate doctrine. The

law will be better served by evolving controlling principles out of the realities of specific cases. In this regard we note the judicial decisions abrogating the doctrine of governmental immunity reflect varying approaches as to when liability attaches. (See, e. g., *Scheele* v. *City of Anchorage,* 385 P. 2d 582 [Alaska 1963]; *Stone* v. *Arizona Highway Commission,* 93 Ariz. 384, 381 P. 2d 107; *Parish* v. *Pitts,* 244 Ark. 1239, 429 S. W. 2d 45; *Muskopf* v. *Corning Hospital Dist.,* supra; *Flournoy* v. *Sch. Dist. 1,* 174 Colo. 110, 482 P. 2d 966; *Hargrove* v. *Town of Cocoa Beach,* 96 So. 2d 130, 60 A. L. R. 2d 1193 [Fla. 1957]; *Smith* v. *State,* 93 Idaho 795, 473 P. 2d 937; *Molitor* v. *Kaneland Com. Unit Dist.,* 18 Ill. 2d 11, 163 N. E. 2d 89; *Campbell; Knotts* v. *State,* 259 Ind. 55, 284 N. E. 2d 733 [1972]; *Klepinger* v. *Bd. of Comm. Co. of Miami,* 143 Ind. App. 155, 239 N. E. 2d 160; *Haney* v. *City of Lexington,* 386 S. W. 2d 738 [Ky. 1964]; *Sherbutte* v. *Marine City,* 374 Mich. 48, 130 N. W. 2d 920; *Williams* v. *City of Detroit,* 364 Mich. 231, 111 N. W. 2d 1; *Spanel* v. *Mounds View School Dist. No. 621,* 264 Minn. 279, 118 N. W. 2d 795; *Johnson* v. *Municipal University of Omaha,* 184 Neb. 512, 169 N. W. 2d 286; *Brown* v. *City of Omaha,* 183 Neb. 430, 160 N. W. 2d 805; *Rice* v. *Clark County,* 79 Nev. 253, 382 P. 2d 605; *Willis, et al.* v. *Dept. of Cons. & Ec. Dev.,* supra; *Ayala et al.* v. *Phila. Bd. of Pub. Educ.,* 453 Pa. 584, 305 A. 2d 877 [1973]; *Becker* v. *Beaudoin,* 106 R. I. 562, 261 A. 2d 896; *Holytz* v. *Milwaukee,* 17 Wis. 2d 26, 115 N. W. 2d 618.) However, in the absence of legislation addressed to the immunity problem in the form of an appropriate Tort Claims Act, liability for tortious conduct of a governmental entity in Kansas will depend upon the particular activity with due consideration given to the totality of all relevant factors.

In the case at bar, we are confronted with a state university which, in the furtherance of its intercollegiate athletic program, undertook to transport its team members, school faculty and interested alumni to an away football game. We are not concerned with the operation and maintenance of a public school. (*Rose* v. *Board of Education,* 184 Kan. 486, 337 P. 2d 652.) Nor do the facts of this case concern the furnishing of transportation for children to and from a public school. (Anno: Schools-Torts-Sovereign Immunity, 33 A. L. R. 3d 703; see, also, K. S. A. 72-8301 *et seq.;* 72-8401 *et seq.;* K. S. A. 1974 Supp. 72-8416, 8417.)



As indicated, the district court sustained the appellee's motion for summary judgment, and all the facts pertaining to this litigation have not been fully presented. We can through judicial notice take cognizance of certain aspects of this case. Through judicial notice, judges may properly take and act upon certain facts without proof because they already know them. (K. S. A. 60-409.)

It is common knowledge that intercollegiate football is "big business" and is operated in a businesslike manner; that it is not only an athletic endeavor of the participating universities, but also entertainment for the school's students, faculty, alumni, as well as the general public. Intercollegiate football is a commercial activity. The benefits and advantages derived from that activity inure to the university, the governmental entity conducting the activity. Here, it was Wichita State University that secured the transportation which occasioned this tragedy, not the alumni, the faculty, or for that matter, the student players. It may not be said that intercollegiate football is in any respect a governmental function—to contend otherwise is to disregard the obvious. Intercollegiate football as presently carried on is a proprietary function. It follows that transporting players and others to a scheduled away intercollegiate football game is likewise a proprietary function of the University. Accordingly, we hold the district court erred in sustaining Wichita State's motion for summary judgment.

We have by this opinion removed the procedural barriers which have prevented the appellants from seeking relief by due course of law. In so doing, we have equalized

again the responsibility of all levels of government in this state for torts when engaged in a proprietary function. However, we intimate no evaluation whatsoever as to the merits of the appellants' tort and implied warranty claims against Wichita State University. In *Johnson* v. *Municipal University of Omaha*, 184 Neb. 512, 169 N. W. 2d 286, 288, it was said:

> "The issue of immunity and the issue of liability are two complete and distinct issues. The removal of governmental immunity in a specified area of tort actions does not impose absolute liability in place of immunity. It only makes a governmental entity subject to the same rules which apply to nongovernmental persons or corporations who do not have the shield of sovereign governmental immunity. . . ." (p. 514.)

Nor should this opinion be regarded as an evaluation of whether the appellants will be able to support their allegations by proof.

Likewise, the district court erred in concluding the Aviation Services Agreement signed by Mr. Katzenmeyer on behalf of Wichita State University and Mr. Danielson on behalf of Golden Eagle Aviation was an unenforceable contract between the University and Golden Eagle and that the plaintiffs could not maintain an action against the University as third party beneficiaries.

There are genuine issues of material fact which remain as to both the third party beneficiaries and tort claims of the appellants.

The judgment is reversed and the case remanded to the district court for further proceedings not inconsistent with this opinion.

## Appendix A
### Aviation Services Agreement

This Agreement, made this July 21 day of 1970, between Golden Eagle Aviation, Inc., a corporation, hereinafter



referred to as "Contractor," and Wichita State University, hereinafter referred to as "Customer";

Witnesseth:

Whereas, Customer has leased (or, prior to the commencement of the services provided for herein, will have leased), from a third party, the following described aircraft:

One Douglas DC-6B
hereinafter referred to as "the Aircraft"; and

Whereas, Customer desires to have Contractor provide, with respect to the Aircraft, the services specified below, upon the terms and conditions hereinafter set forth, and Contractor is willing so to do;

Now, Therefore, Customer and Contractor do hereby agree as follows:

1. *Services:* Contractor shall provide the following services for the Aircraft during the period of time commencing on September 11, 1970, and ending on November 14, 1970:

(*a*) A fully qualified flight crew to fly the Aircraft to and from such points within the Continental United States as Customer may direct (or, if an itinerary is attached hereto, to fly the Aircraft in accordance with said itinerary), said flight crew to consist of:

Captain
First Officer
Flight Engineer
Two Cabin Attendants

(*b*) The following specified in-flight catering services. See attached schedule and itinerary titled "1970—Football Travel Plans".

(*c*) All fuel, oil and other fluids necessary for the operation of the Aircraft pursuant to their Agreement.

(*d*) Routine maintenance on the Aircraft.

2. *Compensation:* As consideration for Contractor's providing the above specified services, Customer shall pay to Contractor a total sum of $24,388.60.

3. *Payment:* Customer shall pay to Contractor the sum of $12,194.30 upon signing this Aviation Service Agreement, this sum to constitute an advance against the total of $24,388.30.

In addition, the Customer shall pay to the Contractor on October 5, 1970 the sum in addition to the advance to constitute payment in full of the Aviation Service Agreement.

4. *Contractor's Personnel:* Contractor's personnel engaged in the performance of this Agreement shall for all purposes remain employees of Contractor. All members of the flight crew shall be licensed and fully qualified in every respect to operate the Aircraft.

5. *Delays or Cancellations:* Contractor shall not be responsible for delays or cancellations occasioned by labor disputes, weather, acts of God, mechanical failure or any other factors beyond the control of Contractor.

6. *Insurance:* Customer, at its expense, shall provide for passenger . . . liability . . . insurance with limits satisfactory and in accordance with the FAA and CAB regulations and shall furnish proof thereof to Contractor.

7. *Entire Agreement:* This Agreement, and any schedules or exhibits attached hereto, constitutes the entire agreement between Customer and Contractor and shall not be modified or amended except by writing signed by both parties.

8. *Counterparts:* This Contract may be executed in numerous counterparts, each such counterpart having the same effect as the original contract.



9. *Choice of Law:* This Contract shall be construed in all respects pursuant to the Laws of the State of Oklahoma.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

GOLDEN EAGLE AVIATION, INC.
By */s/ Bruce J. Danielson,*
Vice President.

ATTEST:
*/s/ Floyd W. Farmer,*
Secretary

WICHITA STATE UNIVERSITY
By */s/ Bert Katzenmeyer.*

KAUL, J., dissenting: I cannot agree with the complete about-face of the majority concerning the constitutional authority of the legislature to deal with governmental immunity.

Time does not permit nor is a discussion of the pros and cons of governmental immunity pertinent to my dissent. Concededly, there are valid arguments on both sides of the issue. In my view the critical question confronting us herein is simply whether this court should assume the ultimate and exclusive power to deal with the subject. Prior to today's decision the constitutional authority of the legislature to deal with governmental immunity has been recognized many times and never questioned by this court. (*Neely* v. *St. Francis Hospital & School of Nursing*, 192 Kan. 716, 391 P. 2d 155, dealt with immunity of charitable institutions, a clearly distinguishable doctrine based upon different considerations.)

In *Woods* v. *Kansas Turnpike Authority*, 205 Kan. 770, 472 P. 2d 219, this court unqualifiedly accepted the legislature's enactment of K. S. A. 46-901 and 46-902 in response to our decision in *Carroll* v. *Kittle*, 203 Kan. 841, 457 P. 2d 21. In an abrupt and complete reversal of its previous posi-

tion the court today has declared 46-901 and 46-902 to be constitutionally void.

My position and the previous status of the law in this jurisdiction are well-expressed by Justice O'Connor speaking for a unanimous court, in response to the legislature's enactment of K. S. A. 46-901 and 46-902, in *Woods*. In the opinion it is stated:

> "In practically every opinion on the subject of governmental immunity we have suggested to the legislature that the extent to which the doctrine is to be applied lies within its province. This court, through *Carroll,* issued an open invitation to the lawmakers to give consideration to the whole area of governmental immunity instead of satisfying themselves, as in the past, with a series of sporadic statutes operating in separate, isolated areas of activity. At the same time *we unequivocally recognized the authority of the legislature to control the entire field of governmental immunity,* including matters covered by judicial decision, and suggested that body was in a better position than this court to do so. The 1970 legislature promptly accepted the challenge and responded with the enactment of Senate Bill No. 465 (L. 1970, ch. 200 [now K. S. A. 46-901 and 46-902]). . . .
>
> "By this enactment the legislature, in its wisdom, has expressed the public policy of this state in the field of governmental immunity pertaining to the state and its various agencies. . . ." (p. 773.) (Emphasis supplied.)

Further in the opinion it is stated:

> "Certainty and stability in the law are always desirable and in the long run best serve the bench, the bar and the citizens of the state. Now that the legislature has spoken in a comprehensive manner on the subject of immunity for the state and its agencies—something lacking at the time of *Carroll*—we believe sound judicial policy dictates that further inroads by this tribunal into the immunity doctrine as it relates to liability of the state is neither warranted nor justified. . . ." (p. 774.)



Subsequent to the *Woods* case Chief Justice Price speaking for a unanimous court in *Daniels* v. *Kansas Highway Patrol,* 206 Kan. 710, 482 P. 2d 46, again referred to our decision in *Carroll* v. *Kittle,* supra, and the aftermath thereof in these words:

> ". . . The decision did, however, (syl. 4) recognize the authority of the legislature to control the entire field of governmental immunity—including matters covered by judicial decisions. The broad-sweeping effect of the decision was of short duration, however, for, as pointed out in *Woods* v. *Kansas Turnpike Authority,* 205 Kan. 770, 773, 472 P. 2d 219, the next session of the legislature promptly accepted the challenge by enacting Chapter 200, Laws of 1970, now appearing at K. S. A. 1970 Supp. 46-901, *et seq.,* effective March 26, 1970." (p. 713.)

Although *Allen* v. *City of Ogden,* 210 Kan. 136, 499 P. 2d 527, did not directly deal with the constitutionality of the statutes in question, Chief Justice Fatzer, again speaking for a unanimous court, referred to the *Carroll* decision in these words:

> ". . . *Carroll* recognized the authority of the Legislature to control the entire field of governmental immunity, including matters covered by judicial decision. . . ." (p. 138.)

Obviously, constitutional authority of the legislature to control the entire field of governmental immunity as a public policy matter was, prior to today's decision, settled law in this state. The majority opinion severely limits, if it does not totally obliterate, legislative prerogative. As indicated in the *Woods* opinion, the previous position of this court was based upon the proposition that governmental immunity was a matter of basic public policy encompassing far-reaching consequences—fiscal and otherwise—and that the legislature was in a better position than this court to express the policy of the people of the state concerning the same. Implicit in prior decisions is the principle that, for

purposes of tort liability, the state, its agencies and other governmental entities may, because of multivarious differences, be reasonably classified differently from private persons—thus satisfying constitutional prerequisites of equal protection and due process. I know of no reasons of public policy which dictate or justify this sudden about-face in judicial attitude concerning a matter of such far-reaching consequences.

Moreover, I cannot agree that the record before us shows that the transportation, by Wichita State of students engaged in university athletics, to be a proprietary function within the boundaries of that concept delineated by prior decisions of this court.

I therefore respectfully dissent.

The judgment of the trial court should be affirmed.

FROMME, J., joins in the foregoing dissent.

FONTRON, J., dissenting: I wish to record my agreement with the views so clearly expressed by Mr. Justice Kaul with respect to the court's abrupt and dramatic turn-about-face in striking down K. S. A. 46-901 and 46-902 as being constitutionally invalid.

FROMME, J., joins in the foregoing dissent.

REPORTER'S NOTE:

Case No. 47,363 and case No. 47,706 consolidated and rehearing granted.



## APPENDIX B

(CAPTION OMITTED IN PRINTING)

SUPREME COURT OF KANSAS

March 6, 1976

Actions were brought against, inter alia, a university Physical Education Corporation, for damages arising out of the crash of an airplane carrying a university football team. A summary judgment for the university, Sedgwick District Court, Division No. 2, Howard C. Kline, J., was reversed and remanded, 217 Kan. 279, 540 P.2d 66. A summary judgment of such court for the Physical Education Corporation was also reversed and remanded, 217 Kan. 661, 538 P.2d 713. Postdecision motions to modify and to supplement the decisions were considered as a motion for rehearing, and the Supreme Court, Schroeder, J., held that even where the court has abrogated judicially imposed governmental immunity the legislature has constitutional authority to reimpose it, and the statute reimposing it does not offend any constitutional provisions.

Judgment granting motion for summary judgment reversed.

Fatzer, C. J., filed an opinion concurring in part and dissenting in part, in which Owsley and Prager, JJ., joined.

• • • • • • • • • •

SCHROEDER, *Justice:*

Pursuant to post-decision motions to modify and to supplement the decisions in *Brown* v. *Wichita State University*, 217 Kan. 279, 540 P.2d 66, and *Brown* v. *Wichita State University, P. E. C., Inc.*, 217 Kan. 661, 538 P.2d 713, this court, considering the motions as motions for rehearing, consolidated those matters and granted a rehearing. The order granting a rehearing requested counsel

to brief four questions, two of which are pertinent to the court's opinion on rehearing:

> "1. Where the court abrogates judicially imposed governmental immunity does the Legislature have the constitutional authority to reimpose governmental immunity?
>
> "2. Assuming the answer to the foregoing question is in the affirmative, does Chapter 200, Laws of 1970, (K.S.A. 46-901 *et seq.*) offend constitutional guarantees in Sections 1, 2 and 18 of the Kansas Bill of Rights, the Fourteenth Amendment to the Constitution of the United States or any other constitutional provisions?"

Pursuant to request the Attorney General of Kansas; the Kansas Legislative Counsel for the Kansas Senate, Kansas House of Representatives and Kansas Legislative Coordinating Council; the Kansas Trial Lawyers Association; the Kansas Association of Defense Counsel; and the League of Kansas Municipalities all filed briefs *amicus curiae* on these questions materially aiding the court in resolving these questions.

The court reaffirms its decision holding that the trial court erroneously granted summary judgment, and it reaffirms the first thirteen syllabi and the corresponding portions of the opinion in *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P.2d 66, pertaining to third party beneficiaries, agency relationships and contractual obligations.

After due consideration, however, the portion of the opinion declaring K.S.A. 46-901, *et seq.,* unconstitutional is vacated.

The facts surrounding this controversy are fully reported in the court's previous opinions and need not be expanded.



In view of the legislature's statutory imposition of governmental immunity, the history of governmental immunity is important in three respects. First, the governmental immunity doctrine was judicially created. Second, it was part of the common law at the time the Kansas Constitution was adopted. (See, *Maffei* v. *Town of Kemmerer,* 80 Wyo. 33, 338 P.2d 808 [1959].) Third, on March 26, 1970, the Kansas Legislature explicitly enacted a comprehensive governmental immunity statute, K.S.A. 46-901, *et seq.,* (L.1970, ch. 200, §§ 1-13, March 26).

Prior to March 26, 1970, the governmental immunity doctrine was of judicial origin in Kansas. This was recognized in *Carroll* v. *Kittle,* 203 Kan. 841, 847, 457 P.2d 21. There it was said our constitution does not touch on the subject and the legislative enactments were characterized as "a series of sporadic statutes," and not "a comprehensive legislative enactment designed to cover the field." (*Carroll* v. *Kittle,* supra at 847-848, 457 P.2d at 27.) In *Carroll* the court further recognized courts throughout the country were widely split on questions of governmental immunity and the governmental or proprietary character of a state hospital operation. The court there stated:

> "After careful consideration a majority of the court is now of the opinion that it is appropriate for this court to abolish governmental immunity for negligence, when the state or its governmental agencies are engaged in proprietary activities, in the absence of the legislature's failure to adopt corrective measures." (p. 848, 457 P.2d p. 27.)

*Carroll,* as indicated by the quotation from *Noel* v. *Menninger Foundation,* 175 Kan. 751, 267 P.2d 934, and the dissenting opinions, was based on matters of public policy and *not based on constitutional grounds.*

*Carroll's judicial abolition* of governmental immunity which was judicially, not *statutorily,* created finds support

in many other states. It must be recognized that many states have judicially abrogated to varying degrees their judicially created doctrine of governmental immunity. (See, *City of Fairbanks* v. *Schaible,* 375 P.2d 201 [Alaska 1962], overruled in part, *Scheele* v. *City of Anchorage,* 385 P.2d 582 [Alaska 1963]; *Stone* v. *Arizona Highway Commission,* 93 Ariz. 384, 381 P.2d 107 [1963]; *Parish* v. *Pitts,* 244 Ark. 1239, 429 S.W.2d 45 [1968]; *Muskopf* v. *Corning Hospital Dist.,* 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 [1961]; *Evans* v. *County Comm.,* 174 Colo. 97, 482 P.2d 968 [1971]; *Hargrove* v. *Town of Cocoa Beach,* 96 So.2d 130, 60 A.L.R.2d 1193 [Fla. 1957]; *Smith* v. *State,* 93 Idaho 795, 473 P.2d 937 [1970]; *Molitor* v. *Kaneland Com. Unit Dist.,* 18 Ill.2d 11, 163 N.E.2d 89, 86 A.L. R.2d 469 [1959], cert. denied, 362 U.S. 968, 4 L.Ed.2d 900, 80 S.Ct. 955 [1960]; *Campbell* v. *State,* 259 Ind. 55, 284 N.E.2d 733 [1972]; *Klepinger* v. *Bd. of Comm. Co. of Miami,* 143 Ind.App. 155, 239 N.E.2d 160 [1968]; *Haney* v. *City of Lexington,* 386 S.W.2d 738, 10 A.L.R.3d 1362 [Ky. 1964]; *Board of C. of P. of New Orleans* v. *Splendour S. & E. Co.,* 273 So.2d 19 [La. 1973]; *Sherbutte* v. *Marine City,* 374 Mich. 48, 130 N.W.2d 920 [1964]; *Williams* v. *City of Detroit,* 364 Mich. 231, 111 N.W.2d 1 [1961]; *Spanel* v. *Mounds View School Dist. No. 621,* 264 Minn. 279, 118 N.W.2d 795 [1962]; *Brown* v. *City of Omaha,* 183 Neb. 430, 160 N.W.2d 805 [1968]; *Johnson* v. *Municipal University of Omaha,* 184 Neb. 512, 169 N.W.2d 286 [1969]; *Rice* v. *Clark County,* 79 Nev. 253, 382 P.2d 605 [1963]; *Merrill* v. *City of Manchester, N.H.,* 332 A.2d 378 [1974]; *Willis, et al.* v. *Dept. of Cons. & Ec. Dev.,* 55 N.J. 534, 264 A.2d 34 [1970]; *Hicks* v. *State,* 88 N.M. 588, 544 P.2d 1153 [1975]; *Kitto* v. *Minot Park District, N.D.,* 224 N.W.2d 795 [1974]; *Ayala et al.* v. *Phila. Bd. of Pub. Educ.,* 453 Pa. 584, 305 A.2d 877 [1973]; *Becker* v. *Beaudoin,* 106 R.I. 562, 261 A.2d 896, reargument denied, 106 R.I. 838, 261 A.2d 896 [1970]; *Long* v. *City of Weirton,* 214 S.E.2d 832 [W.Va. 1975]; *Holytz* v. *Milwaukee,* 17



Wis.2d 26, 115 N.W.2d 618 [1962]; and *Spencer* v. *General Hospital of District of Columbia,* 138 U.S.App.D.C. 48, 425 F.2d 479 [1969].) In all of the above cases it was common law or judicially created immunity which was abrogated, and not a comprehensive statutory enactment. These cases often dismissed the legislative enactments which they encountered as "sporadic" or "not comprehensive." (*Carroll* v. *Kittle,* supra, 203 Kan. at 848, 457 P.2d 21; *Muskopf* v. *Corning Hospital Dist.,* supra 55 Cal.2d at 218, 11 Cal. Rptr. 89, 359 P.2d 457; *Brown* v. *City of Omaha,* supra 183 Neb. at 433-434, 160 N.W.2d 805.)

Following *Carroll's* judicial abrogation of judicially created governmental immunity, the Kansas Legislature quickly passed a "comprehensive" enactment reimposing governmental immunity in Kansas. (See, *Woods* v. *Kansas Turnpike Authority,* 205 Kan. 770, 774, 472 P.2d 219, 222.) This enactment reads in part:

46-901—

"(*a*) It is hereby declared and provided that the following shall be immune from liability and suit on an implied contract, or for negligence or any other tort, except as is otherwise specifically provided by statute:

"(1) The state of Kansas; and

"(2) boards, commissions, departments, agencies, bureaus and institutions of the state of Kansas; and

"(3) all committees, assemblies, groups, by whatever designation, authorized by constitution or statute to act on behalf of or for the state of Kansas.

"(*b*) The immunities established by this section shall apply to all the members of the classes described, whether the same are in existence on the effective date of this act or become members of any such class after the effective date of this act.

"(*c*) The state of Kansas and all boards, commissions, departments, agencies, bureaus and institutions and all committees, assemblies and groups declared to

be immune from liability and suit under the provisions of subsection (*a*) of this section shall, in all express contracts, written or oral, with members of the public, give notice of such immunity from liability and suit." 46-902—

"(*a*) Nothing in section 1 [46-901] of this act shall apply to or change the liabilities of local units of government, including (but not limited to) counties, cities, school districts, community junior colleges, library districts, hospital districts, cemetery districts, fire districts, townships, water districts, irrigation districts, drainage districts and sewer districts, and boards, commissions, committees, authorities, departents and agencies of local units of government.

"(*b*) The provisions of section 1 [46-901] of this act shall not create any liability not now existent according to law, nor effect, change or diminish any procedural requirement necessary for recovery from any local unit of government."

In analyzing K.S.A. 46-901, *et seq.*, the first query on rehearing is:

> "Where the court abrogates judicially imposed governmental immunity does the Legislature have the constitutional authority to reimpose governmental immunity?"

The court answers this question in the affirmative, subject to the limitation that an unconstitutional act is of no binding force.

The Kansas Constitution grants all legislative power to the House of Representatives and to the Senate. (Art. 2, § 1.) In *Leek* v. *Theis,* 217 Kan. 784, 539 P.2d 304, the court held all governmental sovereign power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions. (Syl. ¶ 7.)



Absent violation of constitutional rights, the legislature may control governmental immunity. Our cases prior to *Carroll* have consistently recognized this. (*American Mut. Liability Ins. Co.* v. *State Highway Comm.,* 146 Kan. 239, 243, 69 P.2d 1091; *Shields* v. *State Highway Commission,* 178 Kan. 342, 346, 286 P.2d 173; *Wendler* v. *City of Great Bend,* 181 Kan. 753, 769, 316 P.2d 265; *Caywood* v. *Board of County Commissioners,* 194 Kan. 419, 423, 399 P.2d 561; *Parker* v. *City of Hutchinson,* 196 Kan. 148, 155, 410 P.2d 347; and *McCoy* v. *Board of Regents,* 196 Kan. 506, 512, 413 P.2d 73.)

In *Carroll* v. *Kittle,* supra, the court in abrogating judicially created immunity stated:

> ". . . [W]e want it clearly understood that we recognize the authority of the legislature to control the entire field including that part covered by this opinion. . . ." (203 Kan. p. 848, 457 P.2d p. 27.)

The invitation for legislative action in the face of *Carroll's* abolition of judicially created immunity is significant. In 1966, in *Parker* v. *City of Hutchinson,* supra, the court recognized where other courts had abrogated governmental immunity:

> "'. . . [T]he legislatures have hastened to undo the damage done by the courts and have restored immunity entirely or stated the areas of immunity and liability, prescribed limitations on recovery, and otherwise restored the stature of government as government. . . .'" (196 Kan. p. 152, 410 P.2d p. 351.)

The experiences of Illinois, California and Wisconsin were discussed in the *Parker* opinion. (See also, *McCoy* v. *Board of Regents,* supra 196 Kan. at 509, 413 P.2d 73.) Thus K.S.A. 46-901, *et seq.,* was not totally unexpected by the court. The court, in effect, requested legislative judgment. It has been given. Regardless of the personal views of members of the court, the legislative policy has been clear-

ly enunciated and should be accepted, unless the legislative policy is found to be unconstitutional.

Our cases following *Carroll,* and the legislative reimposition of governmental immunity, have recognized:

> ". . . [S]ound judicial policy dictates that further inroads by this tribunal into the immunity doctrine as it relates to liability of the state is neither warranted nor justified. . . ." (*Woods* v. *Kansas Turnpike Authority,* 205 Kan. 770, 774, 472 P.2d 219, 222.)

(See also, *Daniels* v. *Kansas Highway Patrol,* 206 Kan. 710, 713, 482 P.2d 46; and *Allen* v. *City of Ogden,* 210 Kan. 136, 138, 499 P.2d 527.)

In many of the cases upon which the appellants rely the courts, in abrogating judicially created immunity, have recognized the authority of the legislature to reinstate immunity if it deems it to be better public policy. (*Holytz* v. *Milwaukee,* supra 17 Wis.2d at 40, 115 N.E.2d 618; *Evans* v. *County Comm.,* supra, 174 Colo. at 105, 482 P.2d 968; *Smith* v. *State,* supra 93 Idaho at 803, 473 P.2d 937; *Williams* v. *City of Detroit,* supra 364 Mich. at 235, 244, 260-261, 111 N.W.2d 1; *Brown* v. *City of Omaha,* supra 183 Neb. at 434, 160 N.E.2d 805; *Merrill* v. *City of Manchester,* supra 332 A.2d at 384; and *Becker* v. *Beaudoin,* 106 R.I. supra at 571, 261 A.2d 896.)

Furthermore, in at least nine jurisdictions judicial abrogation of judicially imposed governmental immunity has been followed by at least limited legislative reimposition of immunity. Nothing indicates there was ever any doubt in these jurisdictions that the legislature could occupy the governmental immunity field. (See, Ark.Stat.Ann. §§ 12-2901-03 [Supp.1975]; Cal.Gov't Code §§ 810-996.6 [West 1966]; Colo.Rev.Stat.Ann. §§ 24-10-101-117 [1973]; Ill.Ann. Stat., ch. 85, § 1-101, *et seq.,* [Smith-Hurd 1966]; Mich. Stat.Ann. § 3.996 [101], *et seq.,* [1969]; Minn.Stat.Ann. §§ 466.01-17 [1973]; Nev.Rev.Stat. §§ 41.031-.039 [1973];



N.J.Stat.Ann. § 59:1-1, *et seq.,* [Supp.1974]; and Wis.Stat. Ann. § 895.43 [1966].)

In *Leek* v. *Theis,* supra, the court's view on the separation of powers doctrine was clearly enunciated. The separation of powers doctrine is designed to avoid a dangerous concentration of power, and to allow the respective powers to be assigned to the department best fitted to exercise them. It must be conceded the legislature is better equipped to resolve the difficult policy questions inherent in the field of governmental immunity. As judges our desire to achieve what may seem fair to us as individuals cannot overcome the laws enacted by our duly elected legislators. *Ayala et al.* v. *Phila. Bd. of Pub. Educ.,* supra 453 Pa. at 608, 305 A.2d 877, indicates the legislatures of Hawaii, Iowa, New York, Oklahoma, Oregon, Utah and Washington have statutorily abrogated governmental immunity. The Kansas legislature has chosen to statutorily impose governmental immunity. That view, if constitutional, represents the law which the court must apply to this case.

Having concluded the legislature had the power to reimpose governmental immunity, the query becomes:

> ". . . [D]oes Chapter 200, Laws of 1970, (K.S.A. 46-901 *et seq.*) offend constitutional guarantees in Sections 1, 2 and 18 of the Kansas Bill of Rights, the Fourteenth Amendment to the Constitution of the United States or any other constitutional provisions?"

It is the court's opinion, after carefully reviewing the many decisions cited in the briefs on rehearing, K.S.A. 46-901, *et seq.,* does not offend any constitutional provision.

Long-standing and well established rule of the court are that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. More-

over, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. (*Tri-State Hotel Co.* v. *Londerholm,* 195 Kan. 748, 408 P.2d 877; *Moore* v. *Shanahan,* 207 Kan. 645, 651, 486 P.2d 506; and *Leek* v. *Theis,* supra, 217 Kan. at 793, 539 P.2d 304.)

With this standard in mind, the court first examines Section 18 of the Kansas Bill of Rights. That section provides:

> "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

The appellants argue our abolition of charitable immunity announced in *Noel* v. *Menninger Foundation,* supra, and enforced in *Neely* v. *St. Francis Hospital & School of Nursing,* 192 Kan. 716, 391 P.2d 115, as well as our decision in *Sanders* v. *State Highway Commission,* 211 Kan. 776, 508 P.2d 981, requires that Section 18 be recognized to abrogate governmental immunity. For the reasons hereafter assigned these cases do not require this result.

Section 18 does not create any new rights, but merely recognizes long established systems of laws existing prior to the adoption of the constitution. (See, 16 Am.Jur.2d, Constitutional Law, § 385, p. 721.) Since the right to sue the state for torts was a right denied at common law, such right is not protected by Section 18. This conclusion is consistent with our view that the laws at the time the constitution was framed are relevant in interpreting our constitution. (*Leek* v. *Theis,* supra, 217 Kan. at 793, 539 P.2d 304.) It seems unlikely framers of our constitution intended Section 18 to abrogate governmental immunity. Were this true, our early court decisions would have reached that result. Instead, our prior decisions uphold governmental immunity.



*Noel* v. *Menninger Foundation,* supra, and *Neely* v. *St. Francis Hospital & School of Nursing,* supra, are distinguishable because charitable immunity was not a right existing at common law. As the *Noel* case (175 Kan. p. 756, 267 P.2d 934) indicates, the United States first adopted charitable immunity in 1976 and Kansas first adopted charitable immunity in 1916. Governmental immunity, however, was part of our common law before the Kansas Constitution was adopted. Thus, it was proper for the court to rule in *Noel* that charitable immunity violated Section 18.

Reference is also made to *Sanders* v. *State Highway Commission,* supra, a case dealing with inverse condemnation by the state highway commission. The constitutional provision primarily involved there was Article 12, Section 4. That Section provides:

> "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

In *Sanders* the court held:

> "The appropriation of a landowner's right to the lateral support of his land, while constructing a state highway, is a taking for which our constitution guarantees payment of full compensation." (211 Kan. p. 787, 508 P.2d p. 990.)

The court further recognized inverse condemnation was outside the mantle of immunity provided by K.S.A. 46-901, *et seq.* Thus *Sanders* affords no support for the appellants whose tort claims fall directly within the language of K.S.A. 46-901.

In *Caywood* v. *Board of County Commissioners,* supra 194 Kan. at 422, 399 P.2d 561, and in *McCoy* v. *Board of Regents,* supra 196 Kan. at 511-512, 413 P.2d 73, both

of which were decided after *Noel* and *Neely,* the court held Section 18 and governmental immunity are not irreconcilable. Those decisions are hereby recognized as authoritative and correctly hold Section 18 does not require that governmental immunity be held unconstitutional.

An analogous situation is found in Arkansas whose Supreme Court judicially abrogated the common law of governmental immunity. (*Parish* v. *Pitts,* supra.) The legislature quickly imposed statutory governmental immunity. (Ark.Stat.Ann. §§ 12-2901-2903.) The Arkansas Supreme Court has accepted the legislative statement of public policy as being "plain and unambiguous" and leaving "no room for doubt." (*Sullivan, Adm'r* v. *Pulaski County,* 247 Ark. 259, 261, 445 S.W.2d 94 [1969].) Arkansas has a constitutional provision, (Art. 2, § 13) guaranteeing remedies for injuries which is similar to our Section 18. In the latest Arkansas governmental immunity case, *Hardin* v. *City of DeValls Bluff,* 256 Ark. 480, 508 S.W.2d 559 (1974), it was held:

> "Where there was no established jural right to recovery from a city in a tort action at the time of the adoption of the Arkansas Constitution, Art. 2, § 13 does not prohibit legislation involved in Act 165 of 1969 [Ark.Stat.Ann. 12-2901, *et seq.*] granting governmental immunity to cities and counties." (Syl. ¶ 4.)

It has been acknowledged that our Kansas Constitution was modeled after that of Ohio. (*Leek* v. *Theis,* supra 217 Kan. at 798, 539 P.2d 304.) Their constitution, Art. 1, § 16, has a "due course of law" constitutional provision similar to Section 18 of our constitution. In *Williams* v. *Columbus,* 33 Ohio St.2d 75, 294 N.E.2d 891 (1973), Justice Gray, dissenting, argued that Art. 1, § 16 of the Ohio Constitution meant persons should have relief against the city. But the majority disagreed. (See also, *Nanna* v. *Village of McArthur,* 44 Ohio App.2d 22, 335 N.E.2d 712 [1974].)



In Wisconsin their constitution, Art. 1, § 9, is similar to our Section 18. In *Firemen's Ins. Co.* v. *Washburn County,* 2 Wis.2d 214, 85 N.W.2d 840 (1957), it was held:

> "The provision in sec. 9, art. I, Const., that every person is entitled to a certain remedy in the laws for all 'injuries or wrongs' which he may receive in his person, property, or character, must be construed in the light of the common law as it stood at the time of adoption of the constitution in 1848; immunity of all governmental units from liability for negligence occurring in the performance of a governmental function, such as maintenance of highways, was then well recognized in the common law; hence the application of such common-law rule of governmental immunity does not violate such constitutional provision." (Syl. ¶ 3.)

(See also, *Cords* v. *State,* 62 Wis.2d 52, 214 N.W.2d 405 [1974]; *Hazlett* v. *Board of Com'rs of Muskogee County,* 168 Okl. 290, 32 P.2d 940 [1934]; and *Lundbeck* v. *State, Department of Highways,* 95 Idaho 549, 511 P.2d 1325 [1973].)

In our opinion the view expressed in these states is persuasive.

Judicial foresight requires that Section 18 not be invoked to invalidate *every* statutory or judicial limitation on remedies. Section 18 has been held to refer to remedies in the courts. Yet in *Shade* v. *Cement Co.,* 93 Kan. 257, 144 P.249, it was held a workmen's compensation act does not violate Section 18. In *Fisher* v. *Toler,* 194 Kan. 701, 401 P.2d 1012, it was held that despite Section 18 neither spouse may maintain an action in tort for damages against the other. The interpretation given Section 18 by the appellants would endanger these decisions.

A broad application of Section 18 would jeopardize retention of governmental immunity even for governmental functions. Nearly every state in the union recognizes a need for governmental immunity in functions character-

ized as "governmental." Section 18 does not require the court to hold K.S.A. 46-901, *et seq.*, unconstitutional.

The court next examines the equal protection clause of the Fourteenth Amendment to the United States Constitution which finds its counterpart in Sections 1 and 2 of the Kansas Bill of Rights. (*Manzanares* v. *Bell*, 214 Kan. 589, 522 P.2d 1291.)

In *Tri-State Hotel Co.* v. *Londerholm*, supra, Chief Justice Fatzer set forth clearly and concisely the rules which govern the constitutionality of legislative enactments. There it was stated:

> "This court is by the Constitution not made the critic of the legislature, but rather, the guardian of the Constitution, and every legislative Act comes before this court surrounded with the presumption of constitutionality. That presumption continues until the Act under review clearly appears to contravene some provision of the Constitution. All doubts of invalidity must be resolved in favor of the law. It is not in our province to weigh the desirability of social or economic policy underlying the statute or to question its wisdom; those are purely legislative matters. . . ." (195 Kan. p. 760, 408 P.2d p. 887.)

This is particularly true with regard to the Fourteenth Amendment equal protection clause. In social and economic legislation, a statutory classification does not violate the equal protection clause merely because its classifications are imperfect. (See, *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797; *San Antonio School District* v. *Rodrigues*, 93 S.Ct. 1278, 411 U.S. 1, 36 L.Ed.2d 16, reh. denied, 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418; and *Jefferson* v. *Hackney*, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285, reh. denied, 409 U.S. 898, 93 S.Ct. 178, 34 L.Ed.2d 156.) Nor does the equal protection clause require a state to "choose between attacking every aspect of a problem or not attacking the problem



at all." (*Dandridge* v. *Williams*, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491, reh. denied, 398 U.S. 914, 90 S.Ct. 1684, 26 L.Ed.2d 80; and *San Antonio School District* v. *Rodrigues*, supra 411 U.S. at 42, 93 S.Ct. 1278.) The foregoing principle was well stated in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703:

> ". . . This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms. . . ." (p. 400, 57 S.Ct. p. 585.)

(See also, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563, reh. denied, 349 U.S. 925, 75 S.Ct. 657, 99 L.Ed. 1256; *San Antonio School District* v. *Rodriguez*, supra, 411 U.S. at 42, 93 S.Ct. 1278; and *Manzanares* v. *Bell*, supra 214 Kan. at 609, 522 P.2d 1291.)

The appellants contend K.S.A. 46-901, *et seq.*, denies equal protection by discriminating between the various levels of governmental tort-feasors by imposing liability based on the *unit* of government involved. But withholding a legal remedy for persons injured by the state, while allowing a remedy for a non-governmental tortious activity, or a municipal government's tortious activity, is not discriminatory governmental action. (*Krause* v. *State*, 31 Ohio St.2d 132, 145, 285 N.E.2d 736 [1972], appeal dismissed for want of a substantial federal question, 409 U.S. 1052, 93 S.Ct. 557, 34 L.Ed.2d 506, reh. denied, 410 U.S. 918, 93 S.Ct. 969, 35 L.Ed.2d 280; *Hutchinson* v. *Board of Trustees of Univ. of Ala.*, 288 Ala. 20, 25, 256

So.2d 281 [1971]; and *O'Dell* v. *School District of Independence,* 521 So.2d 403, 409 [Mo. 1975].) The constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. (*Tigner* v. *Texas,* 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1124, reh. denied, 310 U.S. 659, 60 S.Ct. 1092, 84 L.Ed. 1422.) The Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. (*Reed* v. *Reed,* 404 U.S. 71, 75, 92 S.Ct. 251, 30 L.Ed.2d 225.)

Many states hold governmental immunity does not violate the equal protection clause of the Fourteenth Amendment. In states which have refused to judicially abrogate common law immunity, equal protection arguments have failed. (*Crowder* v. *Department of State Parks,* 228 Ga. 436, 185 S.E.2d 908 [1971], appeal dismissed for want of a substantial question, 406 U.S. 914, 92 S.Ct. 1768, 32 L.Ed.2d 113 [1972]; *Azizi* v. *Board of Regents,* 132 Ga.App. 384, 208 S.E.2d 153 [1974], aff'd 233 Ga. 487, 212 S.E.2d 627 [1975]; *O'Dell* v. *School District of Independence,* supra; and *Swafford* v. *City of Garland,* 491 S.W.2d 175 [Tex.Civ.App. 1973]. States whose constitution requires legislative action to abrogate governmental immunity have held governmental immunity does not violate the equal protection clause of the Fourteenth Amendment. (*Krause* v. *State,* supra; and *Hutchinson* v. *Board of Trustees of Univ. of Ala.,* supra.)

The appellants direct our attention to New Hampshire, Michigan, Pennsylvania and Wisconsin where the courts judicially abrogated varying degrees of governmental immunity. Yet in those states immunity for the state government is retained, a classification based solely on the unit of government involved. In none of these states have equal protection arguments succeeded. (*Sousa* v. *State,* N.H., 341 A.2d 282 [1975] *Kriger* v. *Mutual Aid Pact,* 49 Mich.App. 7, 211 N.W.2d 228 [1973]; *Knapp* v. *Dearborn,*



60 Mich.App. 18, 230 N.W.2d 293 [1975]; *Hall* v. *Powers and Commonwealth,* 6 Pa.Cmwlth. 544, 296 A.2d 535 [1972], aff'd 455 Pa. 645, 311 A.2d 612 [1973]; *Forseth* v. *Sweet,* 38 Wis.2d 676, 158 N.W.2d 370 [1968]; and *Cords* v. *State,* supra.)

In *Kriger* v. *Mutual Aid Pact,* supra, the court said:

> ". . . Withholding legal remedy from persons injured by the state, while granting one to persons injured by non-governmental tort-feasors does not offend the equal protection clause. . . ." (49 Mich.App. p. 11, 211 N.W.2d p. 231.)

In *Sousa* v. *State,* supra, the court stated:

> ". . . Nor does it [immunity for the state but not local governmental units] constitute a violation of plaintiffs' rights to equal protection as all those who are similarly situated are similarly treated. . . ." (341 A.2d at 285.)

The United States Supreme Court has held sovereign immunity constitutional. In the early history of this nation it was said in *Beers* v. *State of Arkansas,* 20 How. 527, 61 U.S. 527, 15 L.Ed. 991:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts . . . without its consent and permission. . . ." (p. 529, 15 L.Ed. 991.)

In *Palmer* v. *Ohio,* 248 U.S. 32, 39 S.Ct. 16, 63 L.Ed. 108, involving a property damage claim against the State of Ohio, the court said:

> "The right of individuals to sue a state, in either a federal or a state court, *cannot be derived from the Constitution or laws of the United States.* It can come only from the consent of the state. [Citations omitted.] Whether Ohio gave the required consent . . . is a question of local state law, as to which the decision of the state Supreme Court is controlling

with this court, *no federal right being involved. . . .*" (Emphasis added.) (p. 34, 39 S.Ct. p. 16-17.)

The passage of time has not diminished the impact of *Palmer*. In *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233, reh. denied, 377 U.S. 1010, 84 S.Ct. 1903, 12 L.Ed.2d 1057, the United States Supreme Court allowed suit against Alabama on the ground that Alabama consented by entering into activities within the scope of federal legislation. But the Court was careful to distinguish that case from *Palmer* where consent was not found. (See also, *Harris* v. *Pennsylvania Turnpike Commission*, 410 F.2d 1332 [3rd Cir. 1969], cert. denied, 396 U.S. 1005, 90 S.Ct. 558, 24 L.Ed.2d 497.)

If K.S.A. 46-901, *et seq.*, does create a discriminatory classification, that classification is reasonable and thus not violative of the equal protection clause. In the absence of a suspect classification or a violation of a fundamental right, a statutory discrimination should not be set aside if *any state of facts reasonably may be conceived to justify it.* (*McGowan* v. *Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393; and *Tri-State Hotel Co.* v. *Londerholm*, supra, 195 Kan. at 760-761, 408 P.2d 877.)

The United States Supreme Court states in *Ferguson* v. *Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, 95 A.L.R.2d 1247:

> ". . . Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution. . . ." (p. 732, 83 S.Ct. p. 1032.)

Obviously there are arguments on both sides of the governmental immunity issue. But it is only necessary to reasonably conceive a state of facts to support governmental immunity to uphold the legislative classification set out in K.S.A. 46-901, *et seq.* Three interests support the legislative classification.



First, is the necessity to protect the state treasury. While a state can better afford to pay judgments than a city, and while the experience of states which have abrogated sovereign immunity indicates they have not gone bankrupt, the financial considerations are still relevant. The Missouri Supreme Court, which has consistently held the issue of governmental immunity is for the legislature, said in *Payne* v. *County of Jackson*, 484 S.W.2d 483 [Mo. 1972]:

> ". . . . [W]holesale abrogation of the sovereign immunity doctrine could very well deplete the governmental treasury to a point where proper performance of governmental duties would be impaired. . . ." (p. 486.)

Second, governmental immunity enables government to function unhampered by the threat of time and energy consuming legal actions, which would inhibit the administration of traditional state activities. This serves to aid long-range state planning. Knowledge of the unlimited nature of the state's resources might encourage suits which would otherwise never be brought. Certainly to judicially abrogate legislatively imposed governmental immunity complicates this problem. The Missouri Supreme Court in *Payne* v. *County of Jackson*, supra, referred to the Indiana experience:

> ". . . Following *Perkins* v. *Indiana*, 252 Ind. 549, 251 N.E.2d 30 (1969), which did not eliminate the doctrine entirely but authorized recovery against the state for negligence arising from a *non-governmental function*, the Indiana Attorney General's Office reported (as of April 16, 1971): 'Since the *Perkins* decision, approximately 85 cases have been filed against the State, and the rate is steadily increasing, the State cannot settle these claims; the State cannot hire local counsel to assist in their defense; the State has no procedural mechanism equipped to handle the heavy case load, and perhaps most significant, in the face of millions of dollars worth of suits pending

> and several large judgments, the state has no money appropriated with which to pay these judgments so that successful plaintiffs may not be able to get execution of their judgments in view of the restrictions in Art. IV, Sec. 24 of the constitution that "no special act making compensation to any person claiming damages against the state shall ever be passed."' " (pp. 486, 487.)

The hazards of incomplete "judicial legislation" as mentioned in *Payne* is apropos in Kansas. Under Art. 2, § 24 of our constitution the legislature must make the appropriations for tort claims.

Third, governmental immunity affords that degree of protection demanded by the numerous administrative and high-risk astivities undertaken by the various governments. Public agencies engage in activities of a scope and variety far beyond that of any known private business. (Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity,* 36 S.Cal.L.Rev. 161, 177 [1963].) Activities need only be commercial to be classified as proprietary. (*Wendler* v. *City of Great Bend,* 181 Kan. 753, 316 P.2d 265.) Thus an activity which is financially unprofitable may be provided as a service, or for some other reason, by a governmental unit, but it would not be provided at reasonable cost, if at all, by private enterprise. The appellants would make such commercial activity, regardless of nature, subject to liability. (See, *Brown* v. *City of Omaha,* 183 Neb. 430, 160 N.W.2d 805, [1968] [J. Newton, dissenting].)

Many governmental activities are of a nature so inherently dangerous that no private industry would wish to undertake the risk of administering them. These activities are so important to the health, safety and welfare of the public that they could not possibly be abandoned, although the imposition of broad tort liability upon the agencies engaging in these activities might become extremely burdensome to the taxpayers. (Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity,* supra.)



The appellants contend these arguments also would apply to municipalities. In *Sousa* v. *State,* supra, the New Hampshire Supreme Court answered the argument as follows:

> ". . . [S]tate immunity for torts involves certain factors not present in the immunity of cities and towns. By its magnitude the striking of a balance between granting helief to injured claimants and protecting the solvency of the State is a more complex problem at that level than it is for most cities and towns. Extremely broad considerations of public policy and governmental administration are involved. . . ." (341 A.2d at 285-286.)

The appellants argue our language in *Carroll* v. *Kittle,* supra, compels this court to find that equal protection is violated. There the court stated:

> "We are forced to conclude that the rule of governmental immunity from liability for torts committed while engaged in proprietary functions is today without *rational* basis and hence there is no logical compulsion to extend it. . . ." (Emphasis added.) (203 Kan. p. 850, 457 P.2d p. 29.)

The foregoing statement in isolation is misleading. This court has frequently said that a statement of law in a given case must be tempered by the facts which give rise to its pronouncement. In *Carroll* the court was faced with judicial abrogation of a judicially created immunity on grounds of public policy, not constitutional law. *Carroll* cannot be stretched to hold that no reasonable set of facts may be conceived to uphold the clear and explicit legislative enactment.

The greatest objection to the equal protection argument lies in the fact that the most ardent advocates of abolition of governmental immunity recognize the need to retain some degree of tort immunity. Yet this need to retain

some degree of tort immunity in governmental activities forces an attempt to distinguish the indistinguishable under the equal protection clause. For example, the appellants argue equal protection is violated when liability is determined by the *unit* of government involved. They would prefer to have liability based on the *function* of the governmental tort-feasor.

It must be recognized an injured party has no power to select the tort-feasor causing his injury. If the appellants' distinction is valid, the injury could be occasioned by the activity of a governmental unit whose functions are purely governmental in character and for which no liability would attach, or it could be occasioned by the activity of a governmental unit whose functions are strictly proprietary in character and for which liability would attach. On this argument the appellants assert the legislative classification determined by the unit of government involved creates a distinction which rises to constitutional magnitude.

Regardless of the classification scheme used by the courts or by the legislatures, if some immunity is retained certain persons injured by the government will recover, while others injured, to an equal or greater degree, will not recover. This allegedly discriminatory situation will occur whether the governmental immunity is based on the "governmental-proprietary" distinction, the "discretionary-nondiscretionary" distinction, or an "open-ended" or a "close-ended" statute.

Many of the Tort Claims Acts which are cited by the appellants as examples of constitutional legislation contain limits on recovery. (See, e.g., Wis.Stat.Ann. § 895.-43, and Col.Rev.Stat.Ann. § 24-10-101, *et seq.*) Yet if a state may within the framework of the equal protection clause limit the amount of recovery against the government, why can it not defeat recovery altogether?



The arguments advanced establish that some classification scheme is necessary, and that any classification scheme adopted is a policy decision. If the court declares the policy judgment made by the legislature in K.S.A. 46-901, *et seq.*, unconstitutional, then any classification scheme which retains any governmental immunity is unconstitutional.

There are no cases which hold governmental immunity invalid based on the equal protection clause of the Fourteenth Amendment. One case cited by the appellants seems to support their position. In *Molitor* v. *Kanelond Com. Unit Dist.*, 18 Ill.2d 11, 163 N.E.2d 89, 86 A.L.R.2d 469 (1959), cert. denied, 362 U.S. 968, 80 S.Ct. 955, 4 L.Ed.2d 900 (1960), the Illinois Supreme Court abrogated governmental immunity for local governmental units. (In Illinois the sovereign immunity of the state had a constitutional basis. Section 26 of Article IV of the 1870 Illinois Constitution [repealed 1970] provided that "the State of Illinois shall never be made defendant in any court of law or equity.") The legislature reacted by enacting Ill. Rev.Stat. 1963, ch. 105, par. 12.1-1. In *Harvey* v. *Clyde Park Dist.*, 32 Ill.2d 60, 203 N.E.2d 573 (1965), the Illinois Supreme Court held legislative classification granting complete immunity to some, partial immunity to others and no immunity to others, based upon a variety of factors, violated Section 22 of Article IV of the 1870 Illinois Constitution, which forbade the granting of "any special or exclusive privilege, immunity or franchise" to any corporation, association or individual.

A careful analysis of the *Harvey* case indicates it to be distinguishable on a factual basis as well as a constitutional basis. There the court paraphrased the numerous statutes enacted by the Illinois General Assembly relating to *municipal tort liability* as follows:

> "The legislation thus adopted established the following pattern: Forest preserves, park districts and

the Chicago Park District are not liable for negligence. (Ill.Rev.Stat. 1963, chap. 57½, par. 3a, chap. 105, pars. 12.1-1,333.2a.) There is no general provision granting immunity to municipalities—cities, villages and incorporated towns. The substance of earlier provisions relating to liability in specific situations has, however, been retained. Municipalities are liable for injuries caused by the negligent operation of motor vehicles by firemen and volunteer firemen. Municipalities having a population in excess of 500,000 must completely indemnify policemen for their nonwilful torts; other municipalities must indemnify them to the extent of $50,000. Municipalities are liable for damage to property caused by the removal, destruction or vacation of a building as unsafe or unsanitary under certain circumstances. In specified cases municipalities having a population in excess of 5,000 are liable for damage occasioned by mob violence. (Ill. Rev.Stat. 1963, chap. 24, pars. 1-4-1 to 1-4-8.) The negligent tort liability of private schools and of school districts generally is limited to $10,000. (Ill.Rev.Stat. 1963, chap. 122, pars. 821-31.) The Board of Education of the City of Chicago, however, is required to insure its employees, thus apparently permitting unlimited recovery. (Ill.Rev.Stat. 1963, chap. 122, par. 34-18.1.) Counties are not liable for negligence; however, they must indemnify sheriffs and deputy sheriffs to the extent of $50,000, for losses occasioned by nonwilful torts. (Ill.Rev.Stat. 1963, chap. 34, par. 301.1.) The liability of county superintendents of highways is limited to $10,000. (Ill.Rev.Stat. 1963, chap. 121, pars. 381-87.) But township and district highway commissioners are fully liable for neglect of duty. (Ill.Rev. Stat. 1963, chap. 121, par. 6-402.) Drainage districts are liable for negligent torts, but the district commissioners are absolved of personal liability. (Ill.Rev. Stat. 1963, chap. 42, par. 4-40.) Counties, township and district highway commissioners, school districts, and townships are authorized to purchase liability insurance for their agents, employees and officers. (Ill. Rev.Stat. 1963, chap. 34, par. 429.7; chap. 121, par. 6-412.1; chap. 122, pars. 10-21.6, 10-22.3, 29-9; chap. 139, par. 39.24.) These governmental units are thus apparently given unrestricted freedom to determine



> for themselves whether or not they will be liable for their own negligence." (32 Ill.2d, pp. 62-63, 203 N.E. 2d pp. 574-575.)

The constitutional provisions in Kansas differ materially from those in Illinois and many other states. The Kansas Bill of Rights, Section 2, on privileges reads:

> ". . . No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency."

It has consistently been held in Kansas Section 2 relates to political privileges, not property interests. (*Johnson* v. *Reno County Comm'rs,* 147 Kan. 211, 225, 75 P.2d 849; and *State ex rel. Fatzer* v. *Urban Renewal Agency of Kansas City,* 179 Kan. 435, 439, 296 P.2d 656.) Our constitution seemingly contemplates that special privileges may be granted under certain circumstances which the legislature may control. (See, *Goodrich* v. *Mitchell,* 68 Kan. 765, 769, 770, 75 P. 1034 [Veteran's Preference Law upheld].)

On the facts and the constitutional provisions underlying *Harvey,* which held the Illinois legislative enactment declaring a park district immune from tort liability unconstitutional, a basis for its application to the comprehensive Kansas legislative enactment here under consideration is lacking.

Last the appellants argue constitutional due process is violated by K.S.A. 46-901, *et seq.* For constitutional due process to be violated, the legislation before this court must bear no reasonable relation to a permissive legislative objective. (*Manzanares* v. *Bell,* supra; and *City of Colby* v. *Hurtt,* 212 Kan. 113, 509 P.2d 1142.) Obviously, retaining some immunity is a permissive legislative ob-

jective. Even the appellants argue "it is not a tort to govern."

Judicial history provides some insight. There was a time when the courts used the Fourteenth Amendment due process clause to strike down laws thought to be unwise. (See, *Lochner* v. *New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937.) Since then courts have returned to the original concept of constitutional interpretation, that courts do not substitute their social and economic beliefs for the judgment of legislative bodies whose function it is to pass the laws. (*Ferguson* v. *Skrupa,* 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, 95 A.L. R.2d 1347; and *Manzanares* v. *Bell,* supra.)

The court has been cited to no case where constitutional due process has been used as a basis for the abrogation of legislatively imposed governmental immunity. Neither *Muskopf* v. *Corning Hospital Dist.,* 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961); *Carroll* v. *Kittle,* supra; nor *Martin* v. *State Highway Commission,* 213 Kan. 877, 518 P.2d 437, deal with constitutional due process in the context of governmental immunity.

The court is here presented with a clear and comprehensive legislative enactment on the subject of governmental immunity in K.S.A. 46-901, *et seq.* Recognizing our past pronouncements on the legislative prerogative, it would be unwise and an untenable judicial encroachment upon a matter within the legislative domain for this court to declare K.S.A. 46-901, *et seq.,* unconstitutional on any ground.

Counsel for the appellees in case No. 47,706 assert on rehearing the failure of this court to deal with the Coleman claim. The appellees' motion for summary judgment recites this claim is for the wrongful death of Ray Coleman. The claimants are Willa Hall, Ruth Richardson and Vade White. Interrogatories were served seeking the relationship of these claimants to the decedent. The motion further recites Vade White did not answer the interrogatories and her claim was dismissed by the trial court. Willa Hall and Ruth Richardson answered that they were respectively full sister and half sister of the decedent, and that they were not dependent upon the decedent.



Upon this premise the appellees argue that under Kansas law substantive rights flowing from wrongful death are determined by the law of the state where the injury and death occurred (citing *McDaniel* v. *Sinn,* 194 Kan. 625, 400 P.2d 1018); and under Colorado law (the place where the accident occurred) sisters of a decedent cannot maintain an action for the wrongful death of a brother (citing *Blom* v. *United Air Lines,* 152 Colo. 486, 382 P.2d 993 [1963] and cases cited therein).

While the foregoing recitals are set forth in the appellees' motion for summary judgment, the trial court in sustaining the motion *stated no reasons.* Presumably the motion was sustained for the reasons stated by the trial court in the companion case of *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P.2d 66. (See, *Brown* v. *Wichita State University, P.E.C., Inc.,* 217 Kan. 661, 664, 538 P.2d 713.)

Our reversal of the trial court for the reasons stated in these cases, consolidated on rehearing, recognizes the viability of the wrongful death action by the claimants in the Coleman matter. We cannot accept the appellees' position, that the trial court must be affirmed as to these claims because the claimants have advanced no theory in opposition to the appellees' motion.

Assuming the facts recited are true, the mere citation of two cases by the appellees on an important conflicts of law question is insufficient briefing for this court to resolve the issue stated. The determination of this question may ultimately affect the disposition of many claims

asserted in these cases. We leave this question open. Our recital of the appellees' contention should not be construed as a determination of the issue one way or the other.

The claimants in the Coleman matter are entitled to pursue their cause of action in the trial court until an authoritative determination is made on the basis of the issues presented in the trial court.

In remanding to the district court our original opinion in *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P.2d 66, as modified on rehearing this date, controls the disposition of the tort claims in the cases herein consolidated for rehearing. (*Brown* v. *Wichita State University,* 217 Kan. 279, 540 P.2d 66 and *Brown* v. *Wichita State University, P.E.C., Inc.,* 217 Kan. 661, 538 P.2d 713.) In other words, the constitutional validity of K.S.A. 46-901, *et seq.,* which grants governmental immunity to agencies of the state as set forth in the legislative enactment, must be recognized. Factual issues remain to be determined at the trial level on viable issues sounding in contract.

For the reasons stated in the first thirteen syllabi and the corresponding portions of the opinion in *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P.2d 66, the judgment of the trial court, granting the appellees' motion for summary judgment, is reversed.

FATZER, *Chief Justice* (concurring and dissenting):

As this nation commemorates its 200th year of freedom from a tyrannical monarch, the court today replaces the despotic mantle of "the King can do no wrong" on the shoulders of our state government. By the partial affirmance of *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P.2d 66, the court validates the constitutionality of an irrational statutory scheme which causes serious inequality for persons in Kansas. The decision of the ma-



jority on rehearing renders the doctrine of governmental immunity no less anachronistic; it merely decides the Legislature has constitutionally reimposed this ancient creature of inequity. I must respectfully dissent.

To put the challenged statute, K.S.A. 46-901 *et seq.,* into proper perspective, it is necessary to review the evolution of governmental immunity from tort liability in Kansas. The doctrine is of judicial origin, having first been recognized by this court in *Eikenberry* v. *Township of Bazaar,* 22 Kan. 389 [*556], 31 Am.Rep. 198 (1879). As originally applied, it conferred absolute immunity from liability for tortious conduct on all governmental entities absent their consent to suit.

From this beginning, the court gradually limited the doctrine's application to temper its harshness. Cities were made liable for injuries caused by street defects (*see, e. g., Grantham* v. *City of Topeka,* 196 Kan. 393, 411 P.2d 634; *City of Topeka* v. *Tuttle,* 5 Kan. 186 [*311]) and for creating and maintaining a nuisance. (*E. g., Adams* v. *City of Arkansas City,* 188 Kan. 391, 362 P.2d 829.) School districts were also liable for activities constituting a nuisance. (*Neiman* v. *Common School District,* 171 Kan. 237, 232 P.2d 422.) The most significant limitation on governmental immunity as applied to cities imposed liability for activities of a "proprietary" nature. (*See, e. g., Grover* v. *City of Manhattan,* 198 Kan. 307, 424 P.2d 256; *Hinze* v. *City of Iola,* 92 Kan. 779, 142 P. 947.) By contrast, townships, counties, the state and its agencies were clothed with absolute immunity regardless of the function involved. (*See, McCoy* v. *Board of Regents,* 196 Kan. 506, 413 P.2d 73; *Caywood* v. *Board of County Commissioners,* 194 Kan. 419, 399 P.2d 561; *Eikenberry* v. *Township of Bazaar,* supra.)

In 1969, before the court rendered its decision in *Carroll* v. *Kittle,* 203 Kan. 841, 457 P.2d 21, different rules applied to different units of government, totally independent

of the function involved. *Carroll* found this anomaly in the application of the governmental immunity doctrine indefensible and corrected it. *Carroll* extended the "proprietary" limitation on immunity, previously applied only to cities, to *all* levels of government thereby applying governmental immunity uniformly to all governmental entities and equalizing responsibility for tortious acts no matter what unit of government was involved.

The statute under attack in the instant case is the legislative response to *Carroll.*

I cannot accept the majority's characterization of K.S.A. 46-901 *et seq.,* as a "comprehensive" statute. Only in the sense that it touches every level of government is it comprehensive. It is certainly not comprehensive in the sense of being a reasoned legislative application of governmental immunity in Kansas. The statute is an abrupt legislative reaction that perpetuates and reimposes the irrational classifications recognized and corrected in *Carroll.* Absolute immunity is reinstated for the state and its agencies, unless excepted by other statutes (K.S.A. 46-901); liability of all other governmental entities is to be determined under the rule of *Carroll* (K.S.A. 46-902). By enacting K.S.A. 46-901 *et seq.,* the Legislature, for the first time, sanctioned the application of governmental immunity based on the nature of the governmental unit involved. Once again, redress for one tortiously harmed by government depends entirely on the identity of the tort-feasor.

The first question considered by the court on rehearing was:

> "Where the court abrogates judicially imposed governmental immunity does the Legislature have the constitutional authority to reimpose governmental immunity?"

The majority answers this question in the affirmative "subject to the limitation that an unconstitutional act is



of no binding force." I concur with that portion of the opinion. Our decisions clearly reflect the view that the Legislature may control governmental immunity short of violating constitutional rights. (*See, Carroll* v. *Kittle,* supra; *McCoy* v. *Board of Regents,* supra; *Wendler* v. *City of Great Bend,* 181 Kan. 753, 316 P.2d 265; *American Mut. Liability Ins. Co.* v. *State Highway Comm.,* 146 Kan. 239, 69 P.2d 1091.) But any act of the Legislature *either imposing or waiving* governmental immunity may be put to the constitutional test. *See Cashin* v. *State Highway Comm.,* 137 Kan. 744, 22 P.2d 939.

This limitation on the Legislature's constitutional authority to act is the very essence of the judiciary's role among the coordinate branches of government. As the guardian of the Constitution, it is the court's duty and final responsibility to decide the constitutional validity of the acts of the Legislature. It is axiomatic that an act of the Legislature purporting to impose or waive governmental immunity in this state is subject to the limitation contained in the state and federal Constitutions. Where such act exceeds the bounds of authority vested in the Legislature and violates constitutional limitations, it is null and void, and it is the clear duty of the courts to so declare. In this sphere of responsibility, courts have no power to overturn laws enacted by the Legislature within constitutional limitations, even though the laws may be unwise, unpolitic and unjust. The remedy in such case lies with the people. But when the legislative action transcends a sacred right guaranteed a person by the state or federal Constitution, final decision on the validity of such action must rest exclusively with the courts. (*Tri-State Hotel Co.* v. *Londerholm,* 195 Kan. 748, 760, 408 P.2d 877, 887-88; *Harris* v. *Shanahan,* 192 Kan. 183, 206-07, 387 P.2d 771, 790-91.)

I now turn to the second question submitted on rehearing:

". . . [D]oes Chapter 200, Laws of 1970, (K.S.A. 46-901 *et seq.*) offend constitutional guarantees in Sections 1, 2 and 18 of the Kansas Bill of Rights, the Fourteenth Amendment to the Constitution of the United States or any other constitutional provisions?"

In exercising its responsibility to rule on the constitutional validity of a legislative act, this court in *Brown* v. *Wichita State University,* supra, held K.S.A. 46-901 *et seq.,* violated constitutional guarantees in Sections 1, 2 and 18 of the Kansas Bill of Rights and the Fourteenth Amendment to the United States Constitution. On rehearing, a majority of the court now holds the statute offends none of these constitutional provisions.

I am in accord with the statement of rules set forth in the majority opinion to the effect that the constitutionality of a statute is presumed, that all doubts are resolved in favor of its validity and that before a statute may be stricken down, it must clearly appear it violates the Constitution. Further, it is the court's duty to uphold a statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe it as constitutionally valid, that should be done. (*Leek* v. *Theis,* 217 Kan. 784, 539 P.2d 304; *Tri-State Hotel Co.* v. *Londerholm,* supra.)

After due consideration, I have been persuaded on rehearing that the correct application of Section 18 of the Kansas Bill of Rights is that expressed by the majority opinion; therefore, I concur with that portion of the opinion. However, I cannot abide the majority's ruling that K.S.A. 46-901 *et seq.,* does not violate Sections 1 and 2 of the Kansas Bill of Rights and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. I dissent from that portion of the majority opinion.

It should first be made clear that the *doctrine* of governmental immunity per se is not here under attack. The



majority cites several cases which have upheld the doctrine of governmental immunity, existing either at common law or by provision of a state's Constitution, against equal protection challenges. (*Hutchinson* v. *Board of Trustees of Univ. of Ala.,* 288 Ala. 20, 256 So.2d 281 [1971]; *Crowder* v. *Department of State Parks,* 228 Ga. 436, 185 S.E.2d 908 [1971], appeal dismissed for want of jurisdiction, 406 U.S. 914, 92 S.Ct. 1768, 32 L.Ed.2d 113 [1972]; *O'Dell* v. *School District of Independence,* 521 S.W.2d 403 [Mo. 1975]; *Sousa* v. *State,* N.H., 341 A.2d 282 [1975]; *Krause* v. *State,* 31 Ohio St.2d 132, 285 N.E. 2d 736 [1972], appeal dismissed for want of a substantial federal question, 409 U.S. 1052, 93 S.Ct. 557, 34 L.Ed.2d 506, rehearing denied, 410 U.S. 918, 93 S.Ct. 959, 35 L.Ed. 2d 280 [1973]; *Hall* v. *Powers and Commonwealth,* 6 Pa. Cmwlth. 544, 296 A.2d 535 [1972], aff'd 455 Pa. 645, 311 A.2d 612 [1973]; *Swafford* v. *City of Garland,* 491 S.W.2d 175 [Tex.Civ App. 1973]; *Cords* v. *State,* 62 Wis.2d 42, 214 N.W.2d 405 [1974]; *Forseth* v. *Sweet,* 38 Wis.2d 676, 158 N.W.2d 370 [1968].) The wisdom of these decisions need not concern us here. In *Brown* v. *Wichita State University,* supra, we did not hold the doctrine of governmental immunity per se violated equal protection guarantees. Rather, we held the *statutory application* of the doctrine was constitutionally impermissible.

Cases upholding the *doctrine* of governmental immunity per se against equal protection challenges are distinguishable from the instant challenge to a statutory application of the doctrine. It does not follow that because a state may validly choose to maintain or waive its governmental immunity, any statutory classification scheme, no matter how arbitrary or irrational, may be imposed in the process. When the state chooses to create statutory classifications allowing redress for some governmental wrongs and denying redress for others, such legislative classifications must conform to the equal protection guarantees of the state and federal Constitutions.

Other courts have been presented with equal protection challenges to the statutory application of governmental immunity. (See *Flournoy* v. *State of California,* 230 Cal. App.2d 520, 41 Cal.Rptr. 190 [Dist.Ct.App. 1964]; *Sullivan* v. *Midlothian Park Dist.,* 51 Ill.2d 274, 281 N.E.2d 659 [1972]; *Knapp* v. *Dearborn,* 60 Mich.App. 18, 230 N.W.2d 293 [1975]; *Kriger* v. *Mutual Aid Pact,* 49 Mich. App. 7, 211 N.W.2d 228 [1973].) In each of these cases the challenged statutory classifications based governmental liability on the *function* of governmental entities. The traditional equal protection test was applied and, in each case, a rational basis for the legislative classification was found. In *Brown* v. *Wichita State University,* supra, such a rational basis was found wanting.

The majority cites no cases and my research reveals none which remain good authority for the proposition that a Legislature possesses *unlimited* power to statutorily grant or deny governmental liability in tort. That such legislative action is subject to the requirement of some rationality is illustrated by *Harvey* v. *Clyde Park Dist.,* 32 Ill.2d 60, 203 N.E.2d 573. There a statute making governmental immunity turn on the character of *the governmental unit involved,* as does K.S.A. 46-901 *et seq.,* was held to violate an "equal protection" provision of the state Constitution by being arbitrary, irrational and unconstitutionally discriminatory.

Sections 1 and 2 of the Bill of Rights of the Kansas Constitution are our counterparts to the Fourteenth Amendment to the United States Constitution and are given the same effect as that amendment's Due Process and Equal Protection Clauses. The sections provide in substance that "[A]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," and that ". . . all free governments . . . are instituted for [the] equal protection and benefit [of the people]." (*Henry* v. *Bauder,* 213 Kan. 751, 518 P.2d 362.)



The Fourteenth Amendment to the United States Constitution provides that no state shall ". . . deny to any person within its jurisdiction the equal protection of the laws."

Although some jurists have suggested the right of reasonable access to the courts without the consent of government is just as fundamental as other "fundamental rights" recognized by the United States Supreme Court, (*see Lunday* v. *Vogelmann,* 213 N.W.2d 904, 908 [Iowa 1973] [Reynoldson, J., dissenting]; *Krause* v. *State,* 31 Ohio St.2d 132, 150 n. 14, 285 N.E.2d 736, 747 n. 14 [1972] [Brown, J., dissenting]) the high court has not yet denominated such right as "fundamental." Therefore, the less restrictive "reasonable relation" equal protection test is applicable. This test gives great deference to the legislative classification.

Under the "reasonable relation" test only invidious discrimination offends equal protection guarantees; reasonable classifications of persons are permissible. Distinctions inherent in a particular classification must furnish a proper and reasonable basis for such classification, and the classification cannot be made arbitrarily. (*Manzanares* v. *Bell,* 214 Kan. 589, 522 P.2d 1291; *Henry* v. *Bauder,* 213 Kan. 751, 518 P.2d 362; *Pinkerton* v. *Schwiethale,* 208 Kan. 596, 493 P.2d 200.)

In *Rinaldi* v. *Yeager,* 384 U.S. 305, 308-09, 86 S.Ct. 1497, 16 L.Ed.2d 577, 580, the United States Supreme Court stated:

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. . . . It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. . . . Hence, legislation may impose special burdens upon defined classes in order to

achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' . . ."

In *James* v. *Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600, the United States Supreme Court, relying on *Rinaldi*, ruled the discriminatory treatment of a class created by a Kansas statute violated the Equal Protection Clause, notwithstanding a finding that the statutory classification might further legitimate state interests and that all members of the class were treated alike.

In *Reed* v. *Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-54, 30 L.Ed.2d 225, 229, it was said:

". . . [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . . The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). . . ."

In *Henry* v. *Bauder*, supra, 753, 518 P.2d at 365, we said:

". . . The concept of equality of all citizens under the law is, of course, basic to our free society. We have stated that classifications may not be created arbitarily, discriminatorily or unreasonably, or the principle of equality would be violated. There must be come difference in character, condition, or situation, to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert."



From the above, it is apparent that when a statute provides one class is to be treated differently from another, equal protection requires (1) the legislation apply alike to all within the class and (2) reasonable grounds must exist for making a distinction between those who fall within the different classes.

K.S.A. 46-901 *et seq.*, creates two classes of governmental entities: (1) the state and (2) all others. It treats the state differently than all other levels of government by making it completely immune from liability and suit on any implied contract, negligence or tort action except as specifically provided otherwise by statute. All other levels of government are subject to liability for injuries caused by "proprietary" activities. K.S.A. 46-902 (*a*); *Carroll* v. *Kittle*, supra, Syl. 6.

K.S.A. 46-901 *et seq.*, also creates two classes of persons. Victims of the tortious conduct of the state are placed in one class; victims of the tortious conduct of all other governmental entities, in another.

The Fourteenth Amendment prohibits unreasonable classification of *persons*. It is the classification of persons which results from K.S.A. 46-901 *et seq.*, which must satisfy equal protection guarantees.

Appellees argue and the majority agrees that K.S.A. 46-901 and 902 treat similarly situated persons in a similar manner—that all persons within each class created by the statute are treated equally. To the extent that each person injured by tortious acts of the state is absolutely barred from seeking recovery while each person injured by tortious acts of any other level of government may seek redress in the courts, it is true that similarly situated persons receive similar treatment. However, the practical ef-

fect of K.S.A. 46-901 and 902 is that similarly situated persons do *not* receive similar treatment.

Local units of government are creatures or instrumentalities of the state which, along with the state, exercise state power. In *Eikenberry* v. *Township of Bazaar*, supra, at 391 [*561], this court noted: "[A]ll the powers with which [the townships] are intrusted are the powers of the state, and all the duties with which they are charged are the duties of the state." In *Caywood* v. *Board of County Commissioners*, 194 Kan. 419, 399 P.2d 561, we presented a compendium of cases holding counties are agents of the state and auxiliaries to state government. Likewise, in *Parker* v. *City of Hutchinson*, 196 Kan. 148, 410 P.2d 347, we noted that municipalities are arms and agents of the state and the immunity they enjoy flows from the state. Where two persons are each injured by an arm of the state yet only one may seek redress in the courts, they are *not* treated equally although they *are* similarly situated. Consequently, the classifications created by K.S.A. 46-901 and 902 fail to satisfy the first requirement of equal protection.

But even if K.S.A. 46-901 and 902 did treat similarly situated persons in a similar manner, the equal protection inquiry would not be ended. To pass constitutional muster, there must also be a reasonable ground from making a distinction between the classes created by the statute.

Without question, the statute is discriminatory. Without question, it causes serious inequality for persons within the jurisdiction of this state. But it is only "invidious discrimination" which offends the constitutional guaranty of equal protection (*Ferguson* v. *Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, 95 A.L.R.2d 1347.) Statutory classifications, although discriminatory, are not invidious if based on reasonable grounds. Only when the distinction between the statutorily created classes lacks rationality, does the statute fall under equal protection.



Giving great deference to legislative wisdom, courts will not set aside a statutory discrimination "if any state of facts reasonably may be conceived to justify it." (*McGowan* v. *Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399.) The majority opinion claims three interests—three states of fact which may reasonably be conceived—justify the legislative classification and thereby uphold the statute. These three interests are: (1) the need to protect the state treasury; (2) the need for government to be able to function unhampered by the threat of time and energy consuming legal actions; and (3) the need to protect government in the high-risk activities it performs. None of these apologetics purporting to show the rationality of the statutorily created classes withstand careful analysis.

Governmental immunity persists today primarily because of inertia and financial fears. Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L.Rev. 1363 (1954); Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 Ad.L.Rev. 39, 54 (1969) [hereinafter cited as Sherry].

> "[The doctrine's survival is but a] . . . state of mind conditioned by the spectre that its relinquishment will bankrupt the sovereign and result in governmental paralysis. Such a theory may well have been justifiable in colonial times. But today there is universal agreement that immunity has far outlived its usefulness and is a discredited relic of the past not constant with the needs of civilized society." Sherry at 57.

Fears have frequently been expressed that the removal of governmental immunity would result in dissipation of public funds, the curtailment or disruption of essential governmental functions and the forced insolvency of public entities. Yet experience does not bear out these fears. Since the federal government assumed responsibility for

its torts with the enactment of the Federal Tort Claims Act in 1946, it has not suffered financial ruin. A number of states as well as many foreign countries have also adopted comprehensive rules of government responsibility in tort without suffering the above feared consequences. See Blades, *A Comment on Governmental Tort Immunity in Kansas,* 16 Kan.L.Rev. 265 (1968), [hereinafter cited as Blades]. Cities have long been subject to varying degrees of liability in tort yet it has never been shown that adverse tort judgments have forced a city into insolvency proceedings or caused a serious threat to financial stability. *See O'Dell* v. *School District of Independence,* supra, at 417 (Finch, J., dissenting); *Ayala et al.* v. *Phila. Bd. of Pub. Educ.,* 453 Pa. 584, 305 A.2d 877; David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit,* 6 U.C.L.A.L.Rev. 1 (1959). In the more than thirty years since the doctrine of charitable immunity began its decline, there is no indication in the states abolishing it that donations have diminished, that funds in charitable institutions have been depleted or that the mortality of charitable institutions has increased. *(President and Dir. of Georgetown College* v. *Hughes, 76* U.S.App.D.C. 123, 130 F.2d 810 [1942]; *O'Dell* v. *School District of Independence,* supra, at 417 [Finch, J., dissenting].) In short, governmental immunity is not necessary to protect the state treasury. Experience indicates that the state treasury would not fall to rack and ruin if the shield of immunity were lifted.

In abrogating governmental immunity for all levels of government in New Mexico, the Court in *Hicks* v. *State,* 88 N.M. 588, —, 544 P.2d 1153, 1155 (1975), made some remarks relevant to our present discussion:

> " . . . The argument has been presented that the elimination of sovereign immunity will result in an intolerable financial burden upon the State. We believe it is safe to say that adequate insurance can be secured to eliminate that possible burden in a satisfactory manner. In addition, it would appear that placing the financial burden upon the State, which is able to distribute its losses throughout the populace, is more just and equitable than forcing the individual who is injured to bear the entire burden alone. . . ."



There are several techniques through which government can absorb the burden and spread the cost of government responsibility for tort. Liability insurance offers a buffer. Distribution of the losses from government maladministration can also be achieved through taxation. In any event, it is readily apparent that the shield of governmental immunity is not a necessity to protect the state treasury.

That this "interest" fails to show the rationality of the statutorily created classes was aptly stated in Comment, *Governmental Immunity in Kansas: Prospects for Enlightened Change,* 19 Kan.L.Rev. 211, 224 (1971):

> ". . . [T]his classification of governmental agencies is irrational because it contradicts the major policy rationale behind the immunity doctrine. The argument advanced is that abrogation of immunity will cause the financial breakup of the government. The state has more assets than any other governmental body and is thus better able to resist a breakup. But the statute renders the state immune while allowing other entities, less able to pay, to be held liable. Thus, this classification permits plaintiffs to have a remedy only against the governmental agencies least able to bear the burden. This is not a rational classification."

The necessity of protecting the state treasury fails as a rational justification for discriminating between those persons who fall within the different classes created by K.SA.. 46-901 and 902.

The second "interest" cited as justifying the discriminatory classifications is equally indefensible. To say that government needs to be able to operate unhampered by the threat of legal actions intimates that the state should

not be bothered by the fact it has injured people because it has more important things to do.

> ". . . A government of 'of, by and for the people' derives its strength from being just and reasonable and not irresponsible in its dealings with the people. . . . 'To submit, in justification of the rule, that the immunity is necessary for the proper functioning of [government], is to propound the obvious contradiction that the agency formed to protect society is under no obligation, when active itself, to protect an individual member of society.' " Blades at 267-68.

To say that the threat of legal actions will intolerably hamper government activities is to say that government alone, among all our institutions, cannot properly function if it shoulders responsibility for its actions.

> ". . . For negligent or tortious conduct liability is the rule. Immunity is the exception. Human beings ordinarily are responsible for their own legally careless action. They respond also for negligent harms inflicted by their agents and employees. So do business corporations. Likewise trustees and other fiduciaries generally are liable for their own negligence in administration and operation of the business or property committed to their control. . . ." *(President and Dir. of Georgetown College* v. *Hughes* supra, at 812.)

There is little doubt that immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution. (*Noel* v. *Menninger Foundation,* 175 Kan. 751, 267 P.2d 934; *O'Dell* v. *School District of Independence,* supra, at 415.) Looking at the experience of foreign countries, the federal government, other state governments, certain local governmental entities in this state, as well as that of business, commerce and private individuals, I am unable to see the rationality of justifying the discrimination resulting from K.S.A. 46-901 and 902 on the ground it is necessary for the proper administration of state government.



The third "interest" cited by the majority is the need to protect government in high-risk activities which it, of necessity, performs. Is this a state of facts which justifies the statutory discrimination and gives rationality to the distinction made between the statutorily created classes? Implicit in this state of facts are two assumptions: (1) that *governmental entities* performing such "high-risk" activities need the protection of immunity for their financial security and (2) that *the public* needs to have these governmental entities so protected to insure essential services will not be curtailed. But experience in other jurisdictions indicates absolute immunity in even these "high-risk" activities such as law enforcement is necessary neither for the financial security nor for the proper functioning of government. (*E. g. Mason* v. *Britton,* 85 Wash.2d 321, 534 P.2d 1360 [1975].) Not only does K.S.A. 46-901 *et seq.,* give such high-risk activities complete immunity, except as modified by other statutes, it completely immunizes *all* state activities. The statute paints with an overly broad brush.

> " '. . . [T]oday cities and states are active and virile creatures capable of inflicting great harm, and their civil liability should be co-extensive. Even though a governmental entity does not profit from its projects, the taxpaying public nevertheless does; and it is the taxpaying public which should pay for governmental maladministration. If the city operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper costs of public administration and not as a diversion of public funds. The city is a far better loss-distributing agency than the innocent and injured victim. See 2 Harper and James, Torts, 622 (1956).' " *Ayala et al.* v. *Phila. Bd. of Pub. Educ.,* supra, 453 Pa. at 594-95, 305 A.2d at 882.

But all three "interests" fail as reasonable justifications for making a distinction between the classes created by the statute for an even more basic reason: the arguments supporting discrimination in favor of the state apply

equally well to other governmental entities. If the state treasury needs protection, why do the treasuries of lesser units of government not need it even more? If the state must be free from the bother of threatened legal actions, how can cities and counties perform their essential public services without the same protection? While many levels of government perform certain "high-risk" activities, why does only the state need the complete protection afforded by the statute? The three "interests" simply do not provide a rational justification for the statutory discrimination resulting from K.S.A. 46-901 and 902.

The difference in immunity protection given the state and other governmental entities in Kansas has long perplexed this court. In *Carroll* v. *Kittle,* supra, 203 Kan. at 847, 457 P.2d at 27, we said: "It is difficult for the majority of the court to see why one governmental agency [city, county, state, etc.] performing precisely the same acts . . . should be liable for negligence and others should not." In *Carroll* we also said: ". . . the rule of governmental immunity from liability for torts committed while engaged in proprietary functions is today *without rational basis* . . . ." (*Id.* at 850, 457 P.2d at 29 [emphasis added].) In *Wendler* v. *City of Great Bend,* 181 Kan. 753, 759, 316 P.2d 265, 270, Mr. Justice Schroeder, speaking for the court, said: What justifies the difference [in immunity protection] between the State and its municipal subdivisions is baffling." What justifies the irrational, discriminatory classifications of K.S.A. 49-901 *et seq.,* is equally baffling.

It is illogical, irrational and unfair to premise the availability of remedies upon the nature of the governmental entity causing the harm. As previously noted, local units of government are creatures or instrumentalities of the state which, along with the state, exercise state power. Yet a patient injured in a city or county hospital may seek redress in our courts while his neighbor, injured by an identical act of negligence in the State University Medical Center, may not. Each was harmed by an arm of the state yet redress is allowed only one. The statutory classifications of K.S.A. 46-901 and 902 which cause such discrimination are without rational basis and consequently violate equal protection guarantees.



In *Sanders* v. *State Highway Commission,* 211 Kan. 776, 508 P.2d 981, we held that the State Highway Commission was liable for undermining a property owner's backyard. There, as a result of excavation along a roadway, a sizable portion of plaintiff's backyard caved in. The state was required to respond in damages. Had the Sanders or their children fallen with the dirt and suffered injury or death, K.S.A. 46-901 *et seq.,* would allow no remedy. Such discrimination against personal rights and in favor of property rights makes the statute even more irrational.

The foregoing examples merely serve to illustrate what is by now obvious—that the practical effect of K.S.A. 46-901 and 902 is invidious discrimination of the rankest kind. Persons falling within the same class created by the statutes do not receive equal treatment; the distinctions made between the classes are without rational basis. Such discrimination fails to conform to the equal protection guarantees of the state and federal Constitutions.

The majority attempts to distinguish *Harvey* v. *Clyde Park District,* 32 Ill.2d 60, 203 N.E.2d 573, on both a factual and constitutional basis, but that case is strikingly appropriate to the instant decision. In *Harvey,* a statute barred plaintiff's recovery for injuries sustained through the negligence of a park district. Plaintiff challenged that statute as violating provisions of the Illinois Constitution in light of the statutory pattern applying governmental immunity to other governmental entities. By statute, Illinois had applied varying degrees of governmental immunity to all levels of government. Although the Constitution prohibited suits against the state, the Legislature had effectively eliminated the state's governmental immunity

by establishing a court of claims with jurisdiction over tort claims against the state and by eliminating the defense of governmental immunity in such claims. *Id.* at 64, 203 N.E.2d at 575. If the plaintiff in *Harvey* had sustained his injury in a park operated by a city or village, there would have been no legislative impediment to full recovery. If such injury had occurred in recreational facilities maintained by a school district or the state, limited recovery could have been had. Recovery for such injury occurring in a forest preserve district or park district was absolutely barred. The *Harvey* court could find "no discernible relationship to the realities of life" in this statutory pattern and held the statute barring plaintiff's recovery was arbitrary, irrational and discriminatory. *Id.* at 67, 203 N.E.2d at 577.

Such a statutory scheme making recovery depend entirely on a fortuitous circumstance—what level of government the tort-feasor happens to be—is directly analogous to K.S.A. 46-901 *et seq.* The discrimination resulting from K.S.A. 46-901 *et seq.* i,s equally irrational and equally unconstitutional.

Differences in the Illinois constitutional provision violated in *Harvey* and Section 2 of the Kansas Bill of Rights do not render *Harvey* meaningless authority as the majority suggests. In light of *Henry* v. *Bauder,* supra, earlier holdings that Section 2 of the Kansas Bill of Rights applies only to *political privileges* are rendered suspect. In *Henry,* the Kansas Guest Statute was held to violate Sections 1 and 2 of the Kansas Bill of Rights and the Equal Protection Clause of the Fourteenth Amendment by denying recovery for *personal injury* in an arbitrary, discriminatory and irrational manner. *Id.* 213 Kan. at 754, 518 P.2d at 366. In the instant action, K.S.A. 46-901 *et seq.*, infringes on similar rights in violation of the equal protection provisions of the Kansas and United States Constitutions.



More importantly, the rationale applied to test compliance with the Illinois constitutional provision is directly analogous to the rationale by which compliance with the Fourteenth Amendment Equal Protection Clause and Section 2 of the Kansas Bill of Rights is tested. Sections 1 and 2 of the Kansas Bill of Rights are given much the same effect as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*Manzanares* v. *Bell,* supra; *Henry* v. *Bauder,* supra; *Tri-State Hotel Co.* v. *Londerholm,* supra.) The Fourteenth Amendment requires there be a *rational basis* for legislating different treatment for classes created by statute. When a statute is challenged as violating Section 22 of Article 4 of the 1870 Illinois Constitution (now Section 4 of Article 13 of the 1970 Constitution), "[t]he determinative question . . . is whether the statutory classification is *rational.*" (*Harvey* v. *Clyde Park District,* supra, 32 Ill.2d at 64, 203 N.E.2d at 575.) (Emphasis added.) The rationale of the *Harvey* court and its treatment of the statutory pattern of discrimination is clearly analogous to the instant case.

The majority says that if K.S.A. 46-901 and 902 are unconstitutionally arbitrary and irrational, then *any* statutory classification applying governmental immunity must be similarly defective. This conclusion is fraught with logical inconsistencies. While it is true that all statutory classifications discriminate against certain persons, it does not follow that all classifications applying governmental immunity are equally discriminatory and equally irrational. Not all such statutory classifications invidiously discriminate. As the *Harvey* court noted, its holding the statutory classification based on level of government was unconstitutionally discriminatory did not mean no valid classification for the purposes of tort liability was possible. The court said it was feasible and perhaps desirable to classify in terms of types of governmental functions instead of classifying in terms of different governmental agencies that

perform the same function. The tort claims acts of the federal government, California and Michigan are all examples of statutes applying governmental immunity based on *functional* distinctions. (See 28 U.S.C., §§ 2671 *et seq.*; Cal.Gov't Code, §§ 810 *et seq.*; Mich.Stat.Ann. § 3.996 [107].)

*Kriger* v. *Mutual Aid Pact*, 49 Mich. App. 7, 211 N.W.2d 228, is another illustration that there may be a rational basis for a statutory classification applying governmental immunity based on governmental *function*. Michigan has, by statute, equalized governmental immunity for all levels of government. (Mich.Stat.Ann. § 3.996 [107].) All governmental entities are immune from liability for injuries arising from "governmental" functions; all are subject to liability for injuries arising from "proprietary" functions. In *Kriger*, an equal protection challenge to the statute failed; the court found a reasonable basis for the statutory classification.

Although the "governmental-proprietary" distinction still has vitality, as we noted in *Brown* v. *Wichita State University*, supra, it is not the only functional distinction applying uniformly to all units of government that can be made, nor is it necessarily the most desirable. Implicit in any such distinction is the recognition that "it is not a tort for government to govern." (*See, Dalehite* v. *United States*, 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L.Ed. 1427, 1452 [Jackson, J., dissenting].) Other functional distinctions may be more workable and less confusing than the "governmental-proprietary" one which has been condemned by courts and commentators. (*See, e. g.*, W. Prosser, Laws of Torts, § 131, at 979 [4th ed. 1971].) The Restatement (Second) of Torts, Ch. 45A (Tent.Draft No. 19, 1973), reflecting the reasoned view of many of our best legal minds, offers a useful guide for the application of governmental immunity.



Under the Restatement view, liability is the rule and immunity the exception. Within that exception are acts or omissions constituting the exercise of a judicial or legislative function. These are immune because an action in tort for damages is neither the appropriate form of review of such acts or omissions nor a suitable remedy. Likewise, all legislative acts or omissions and those executive acts or omissions involving basic policy decisions are immune because the courts should not pass judgment on such policy decisions of coordinate branches of government. But immunity is not retained for executive and administrative acts not involving basic governmental policy decisions. For these acts or omissions, all levels of government are subject to liability. For example, a governor's decision to activate the National Guard and a state hospital orderly's decision to leave a mop in a hallway are both decisions of a state officer or employee involving some discretion. Only one involves a basic governmental policy decision. The Restatement would give immunity for only the governor's action; K.S.A. 46-901 gives immunity to both.

The Restatement notes that elimination of general tort immunity does not establish liability for acts or omissions which are otherwise not tortious. Actions of a governmental officer or employee may be *privileged* under regular principles of tort law. A privilege defeats the existence of the tort itself; an immunity, on the other hand, admits the tort, but bars any resulting liability. (W. Prosser, Laws of Torts 970 [4th ed. 1971].) Likewise, the state's failure to perform a service or provide a benefit is not tortious if it has no affirmative duty to act.

Little need be said about due process. To pass constitutional muster under the due process provisions of our state and federal Constitutions, a statute must bear a reasonable relation to a permissible legislative objective. (*Manzanares* v. *Bell*, supra.) That the application of governmental immunity is a permissible legislative objective is illus-

trated by the tort claims acts of the federal government and many other states. However, the element of *reasonableness* is also required to satisfy the due process test. Due process considerations cannot be isolated from the foregoing dicussion baring the stark irrationality of the statutory classifications created by K.S.A. 46-901 and 902. The "interests" advanced by the majority, which fail to provide a rational basis for the statutory discrimination, likewise fail to satisfy the reasonablness requirement of due process. For these reasons and those more fully set forth in *Brown* v. *Wichita State University*, supra, I would affirm the court's holding in *Brown* that K.S.A. 46-901 and 902 violate the guarantee of due process of law as provided in the Fourteenth Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights.

Clearly, there are constitutionally permissible ways in which the Legislature may apply governmental immunity in Kansas. But just as clearly, the line K.S.A. 46-901 *et seq.*, draws between immunity and liability fails to conform to constitutional requirements. Governmental immunity offers great possibilities for abuse of the individual by the oppressive hand of government. It should be applied with great caution.

> ". . . The doctrine, which was originally promulgated to immunize a weak government against oppressive and insensitive individual demands, has in its present form outlived its usefulness. Today it is the citizen who is helpless when faced with increasing governmental intrusion in his daily life. It is likely that this intrusion will grow as our society becomes even more complex and difficult to manage. The results of governmental presence are and will continue to be frequently unpredictable and sometimes tragic. Because the immunity doctrine is an anachronism, and also because, uncontrolled, it is a threat to our collective sense of justice, prompt legislative and judicial modifying action is necessary." Comment, *Governmental Immunity in Kansas: Prospects for Enlightened Change*, 19 Kan.L.Rev. 211, 214-15 (1971).



Webster's Third New International Dictionary, unabridged, defines "anachronism" as a thing that is chronologically out of place—something that belongs to a former age and is incongruous if found in the present. What better example than governmental immunity. "The social climate which fostered the growth of absolutism . . . has long since been tempered with the warm winds of humanitarianism and individual freedom." Smith, *Municipal Tort Liability*, 48 Mich.L.Rev. 41, 48 (1949). Once the people existed for the sovereign; today, our government is of, by and for the people, once it was thought better that an individual sustain an injury than the public suffer an inconvenience; today, imposing the entire burden of government's wrongful acts on the single injured individual is abhorrent to our social philosophy. A fundamental concept of our system of laws is that one may seek redress for every substantial wrong. Today, there is widespread acceptance of the philosophy that those who enjoy the fruits of an enterprise must accept the burden of its risks and responsibilities. Yet the shield of governmental immunity persists—an enigma perpetuated by inertia and unfounded financial fears.

Governmental immunity as applied by K.S.A. 46-901 and 902 is completely contradictory to the principles on which our government is based—that government exists for the benefit of the people and must be held responsible to them. In 1976, insulating state government at the expense of the personal well-being of the people shocks the conscience. To maintain a system of laws whereby we are individually liable but collectively immune is more than irrational, it is immoral.

The Legislature may choose to respond with indifference to the majority's affirmation of the existing statutory ap-

plication of governmental immunity in Kansas. I can only hope that, instead, the Legislature will respond to this decision of the court with a critical and searching re-examination of these statutes. An abundance of evidence is at hand which convincingly demonstrates it is both desirable and feasible that government at all levels accept increased responsibility for its actions. I look forward to the day the Legislature enacts new measures more in keeping with the needs of Kansas citizens and Kansas government.

I concur in the majority's affirmance of the first thirteen syllabi and the corresponding portions of the court's opinion in *Brown* v. *Wichita State University,* supra. I would adhere to the court's holding in *Brown* that the doctrine of governmental immunity as applied by K.S.A. 46-901 and 902 violates the guarantees of equal protection and due process of law as provided in the Fourteenth Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights, and I would direct the district court to proceed to trial on all viable issues sounding in tort and contract.

OWSLEY and PRAGER, JJ., *join in the foregoing dissent.*



## APPENDIX C

### Journal Entry of Judgment

[Filed: June 27, 1973]

This matter having come before the Court upon defendant, Wichita State University's, Motion for Summary Judgment was heard on special setting on January 11, 1973, before the Honorable Howard C. Kline. The movant defendant, Wichita State University, was represented by Paul B. Swartz of Martin, Pringle, Schell & Fair, its attorneys of record; the defendant, Wichita State University Physical Education Corporation, Inc., was represented by Wayne Coulson and J. Eric Engstrom of Fleeson, Gooing, Coulson & Kitch, its attorneys; plaintiffs in the *Brown, et al.*, Case No. C-23843, were represented by their attorneys, Frank H. Granito, Jr. of Speiser, Shumate, Geoghan & Krause, and David W. Kennedy; plaintiffs in the *Robinson, et al.*, Case No. C-26190, were represented by their attorneys, Frank H. Granito, Jr. of Speiser, Shumate, Geoghan & Krause, and Ronald Heck of McDonald, Tinker, Skaer, Quinn & Herrington; and the plaintiffs in the *Bruce, et al.*, Case No. C-26228, were represented by their attorneys, M. William Syrios of Michaud, Cranmer, Syrios & Post, and John W. Norman of Lampkin, Wolfe, Burger, Abel, McCaffrey & Norman, and Lawrence J. Galardi of Magna and Cathcart.

Thereupon, after consideration of defendant, Wichita State University's, motion and the depositions in support thereof and after hearing arguments of counsel for all parties, the Court finds that the Kansas governmental immunity statutes, K.S.A. 46-901 are constitutional and that the plaintiffs' tort and implied warranty claims cannot be maintained against Wichita State University; and assuming the factual issues to be viewed in a light most favorable to plaintiffs, that is, assuming, for the purposes of this motion, that Mr. Danielson, acting in good faith on behalf

of Golden Eagle Aviation, believed Mr. Katzenmeyer to be such agent of Wichita State University, and that, under the circumstances, it was reasonable for Mr. Danieldson to believe that Wichita State University authorized Mr. Katzenmeyer to enter into the contract in question on behalf of Wichita State University, the contract that was signed by Mr. Katzenmeyer and Mr. Danielson is nevertheless an unenforceable contract between Wichita State University and Golden Eagle Aviation, Inc., and therefore the plaintiffs herein cannot maintain an action against defendant, Wichita State University, as third party beneficiaries.

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT that defendant Wichita State University's motion for a summary judgment in its favor and against all of the plaintiffs on all claims be granted and allowed.

/s/ HOWARD C. KLINE
*District Judge*



## APPENDIX D

IN THE SUPREME COURT OF THE STATE OF KANSAS

Case No. 47,363

MARVIN G. BROWN, SR., et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*. MIKE BRUCE, et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*. HALLIE EUGENE ROBINSON, Individually and as the Administratrix of the Estate of Eugene Robinson, et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*.

Case No. 47,706

MARVIN G. BROWN, SR., et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al, *Appellees*. MIKE BRUCE, et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*. HALLIE EUGENIA ROBINSON, Individually and as the Administratrix of the Estate of Eugene Robinson, et al., *Appellants*, v. WICHITA STATE UNIVERSITY, PHYSICAL EDUCATION CORPORATION, INC., *Appellee*.

**Order**

On this 12th day of September, 1975, upon consideration and for good cause shown it is ordered that the appellee Wichita State University's motion for modification of decision in case No. 47,363, filed herein June 30, 1975, be and the same is hereby considered by the court as a motion for rehearing, and as such, the same is hereby sustained and this case will be set for rehearing on a date hereafter fixed by further order of this court.

Upon further consideration and for good cause shown it is ordered that the appellee Wichita State University, Physical Education Corporation, Inc's. motion to supplement opinion in case No. 47,706, filed herein August 4,

1975, is hereby considered by the court as a motion for rehearing, and as such, the same is hereby sustained and this case will be set for rehearing on a date hereafter determined by order of the court.

Upon further consideration and for good cause shown it is ordered that case No. 47,706 be and the same is hereby consolidated with case No. 47,363 for the purpose of rehearing both cases, and counsel for the parties are directed to brief and argue the consolidated case upon such questions and points as hereafter directed by further order of this court. The consolidated case shall bear the number of 47,363.

Upon further consideration and for good cause shown it is ordered that the following named counsel are requested to file briefs amicus curiae upon the questions and points to be hereafter designated by this court: The Attorney General of Kansas; the Kansas Legislative Counsel for the Kansas Senate, Kansas House of Representatives and Kansas Legislative Coordinating Council; the Kansas Trial Lawyers Association; the Kansas Association of Defense Counsel, and the League of Kansas Municipalities. Counsel will be advised of the dates fixed for the filing of such briefs and the date of rehearing.

Dated at Topeka, Kansas, this 12th day of September, 1975.

*By order of the court*



IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 47, 363

MARVIN G. BROWN, SR., et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*. MIKE BRUCE, et al., *Aplants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*. HALLIE EUGENIA ROBINSON, Individually and as the Administratrix of the Estate of Eugene Robinson, et al., *Appellants*, v. WICHITA STATE UNIVERSITY, et al., *Appellees*.

**Order**

(Filed October 2, 1975)

Pursuant to the order of this court dated September 12, 1975, consolidated case No. 47,363 is ordered restored to the docket and is assigned for reargument during the December 1975 Session on a date to be hereafter announced. In their briefs and on oral argument, counsel for the parties are requested to discuss particularly the following questions:

1. Where the court abrogates judicially imposed governmental immunity does the Legislature have the constitutional authority to reimpose governmental immunity?
2. Assuming the answer to the foregoing question is in the affirmative, does Chapter 200, Laws of 1970, (K.S.A. 46-901 *et seq.*) offend constitutional guarantees in Sections 1, 2 and 18 of the Kansas Bill of Rights, the Fourteenth Amendment to the Constitution of the United States or any other constituional provisions?
3. Assuming it is decided that the doctrine of governmental immunity as declared in K.S.A. 46-901 *et seq.* is unconstitutional and void,
   (a) does the rule of law concerning governmental immunity as declared in *Carroll* v. *Kittle*, 203 Kan. 841, 457 P.2d 21, control?

(b) is the "governmental-proprietary" distinction sound and should it be maintained or abolished?

4. What is the scope of legislative power to regulate or restrict the liability of the state or its political subdivisions for tortious acts of public employees?

Counsel invited to file briefs amicus curiae are requested to brief and discuss questions 1-4 above.

Counsel for the parties are not limited to the foregoing questions but, in addition, may brief questions relative to the motion for modification of decision in case No. 47,363 and the motion to supplement opinion in case No. 47,706.

Briefs of the parties will be filed with the clerk of the supreme court not later than the following:

The appellants' briefs, November 10, 1975.

The appellees' briefs, December 1, 1975.

The briefs amicus curiae, December 1, 1975.

Dated at Topeka, Kansas, this 2nd day of October, 1975.

*By order of the court*



## APPENDIX E

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 47,363
47,706

MIKE BRUCE, et al., *Appellants,*

v.

WICHITA STATE UNIVERSITY, et al., *Appellees.*

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing by Appellant is DENIED.

Yours very truly,

LEWIS C. CARTER
*Clerk, Supreme Court*

Date April 14, 1976

IN THE SUPREME COURT OF THE STATE OF KANSAS

(Caption Omitted in Printing)

**Notice of Appeal**
**To The Supreme Court of the United States**

I

Notice is hereby given that Mike Bruce; Thomas D. Christian and Ruth Christian, co-administrators of the Estate of Don Christian; Willa Hall, Ruth Richardson and Veda White, survivors of Ray Coleman, deceased; L. L. Roberts, guardian ad litem of Vicki F. Dunn, Lisa A. Dunn, and Gary Lee Dunn, minor children of Judith Ann Dunn, deceased; Tommie Grooms, conservator of Nancy

Lee Grooms and Eric Thomas Grooms, minors, and Tommie Grooms, administrator of the Estates of John W. and Etta Mae Grooms, deceased; John Hoheisel; Randy Jackson; Mary Lynne King Knott; Glen Kostal; James W. Lane; Keith Morrison; Bob Renner; and Rick Stephens, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of April 15, 1976, denying appellants' Motion for Rehearing and affirming its opinion entered in this action on March 6, 1976.

This appeal is taken pursuant to Title 28, United States Code, Section 1257(2).

/s/ LARRY A. TAWWATER
Larry A. Tawwater

/s/ JOHN W. NORMAN
John W. Norman

*Counsel for Appellants*

LAMPKIN, WOLFE, BURGER,
McCAFFREY & NORMAN

815 Cravens Building
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**APPENDIX F**

ARTICLE 9.—CLAIMS AGAINST THE STATE

**46-901. Governmental immunity of state; implied contract, negligence or other tort; notice in state contracts.** (*a*) It is hereby declared and provided that the following shall be immune from liability and suit on an implied contract, or for negligence or any other tort, except as is otherwise specifically provided by statute:

(1) The state of Kansas; and

(2) boards, commissions, departments, agencies, bureaus and institutions of the state of Kansas; and

(3) all committees, assemblies, groups, by whatever designation, authorized by constitution or statute to act on behalf of or for the state of Kansas.

(*b*) The immunities established by this section shall apply to all the members of the classes described, whether the same are in existence on the effective date of this act or become members of any such class after the effective date of this act.

(*c*) The state of Kansas and all boards, commissions, departments, agencies, bureaus and institutions and all committees, assemblies and groups declared to be immune from liability and suit under the provisions of subsection (*a*) of this section shall, in all express contracts, written or oral, with members of the public, give notice of such immunity from liability and suit. [L. 1970, ch. 200, § 1; March 26.]

• • • • • • • • • • •

**46-902. Nonapplication to local units of government.** (*a*) Nothing in section 1 [46-901] of this act shall apply to or change the liabilities of local units of government, including (but not limited to) counties, cities, school districts, community junior colleges, library districts, hospital districts, cemetery districts, fire districts, townships, water districts, irrigation districts, drainage districts and sewer districts, and boards, commissions, committees, authorities, departments and agencies of local units of government.

(*b*) The provisions of section 1 [46-901] of this act shall not create any liability not now existent according to law, nor effect, change or diminish any procedural requirement necessary for recovery from any local unit of government. [L. 1970, ch. 200, § 2; March 26.]

• • • • • • • • • •